Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSEPH CAMMARANO,

Petitioner,

v.

MICHAEL W. MOORE, Secretary, Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I.

WHERE THERE IS NO EVIDENCE THAT THE STATE COURT MET ITS OBLIGATION TO APPLY THE HARMLESS BEYOND A REASONABLE DOUBT STANDARD OF *CHAPMAN v. CALIFORNIA* IN A STATE PRISONER'S DIRECT APPEAL, DOES THE HARMLESS ERROR STANDARD OF *CHAPMAN*, RATHER THAN *BRECHT v. ABRAHAMSON*, APPLY TO THE PRISONER'S FEDERAL HABEAS CORPUS ACTION?

II.

CAN ERROR BE FOUND HARMLESS UNDER *BRECHT v. ABRAHAMSON* BY ISOLATING THE PROSECUTION'S CASE WITHOUT ANY REGARD TO THE DEFENSE?

III.

IS A VIOLATION OF *EDWARDS v. ARIZONA* HARMLESS *PER SE* UNDER *HARRIS v. NEW YORK*?

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The opinion of the court of appeals is reproduced in the Appendix filed herewith ("App.") at App. 1. The opinion of the district court appears at App. 2-27.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed is the unpublished decision of the United States Court of Appeals for the Eleventh Circuit which was entered on April 27, 2000. (App. 1). A timely filed application for extension of time within which to file a petition for writ of certiorari was granted to August 28, 2000. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254 in relevant part provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) that there is either an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On May 24, 1984, Dennis Potenzo shot and killed two employees of a lounge in Orlando, Florida, in the course of a robbery. After the shooting, Potenzo was observed walking near the lounge with the petitioner. A police officer approached them. Potenzo was carrying a towel. The petitioner was carrying a bag in which the officer observed money. Potenzo dropped the towel and fled. The officer lifted the towel and saw a gun under it. The petitioner was arrested and charged with felony murder. Potenzo was later arrested and charged with the murders. (App. 2-3,).

Prior to trial, the petitioner moved to suppress statements obtained from him based upon *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which held that a criminal defendant's rights are violated by the use of a confession obtained by police-instigated interrogation, without counsel present, after an attorney has been requested. At an evidentiary hearing on the motion to suppress, the two interrogating officers acknowledged that the petitioner had asked whether his attorney, William Sheaffer, could be present during the ensuing interrogations. The officers did not honor the request, continued to interrogate the petitioner, and obtained the statements in question. The state trial judge denied the pretrial motion to suppress without any findings. (App. 3-5, 44-46).

The petitioner retained Sheaffer to represent him. The State moved to disqualify Sheaffer on the ground that he was being investigated by the same prosecutor who was prosecuting the petitioner and that Sheaffer could be a witness at the petitioner's trial. The prosecutor's investigation was based upon an allegation that Sheaffer was involved in bribing a prosecution witness in the petitioner's case. At a hearing on the motion to disqualify, the prosecutor informed the trial judge that Sheaffer was facing indictment. The state trial judge conducted no inquiry into any conflict of interest arising from Sheaffer's representation of the petitioner against the same

prosecutor who was investigating Sheaffer. The prosecutor's motion to disqualify was denied. (App. 5-6, 46-48).

Approximately ten days before the motion for disqualification of Sheaffer was filed, Hinton Waters, a Florida inmate, wrote a letter to the jail chaplain. Waters related that he was told by Potenzo that he committed the robbery and murders without the petitioner's knowledge and that Potenzo stated he would implicate the petitioner to save himself from the electric chair. (App.11, 47-48).

Not long after he received the letter from Waters, the chaplain contacted Sheaffer and showed him the letter. Sheaffer took the letter but the chaplain later testified that Sheaffer appeared disinterested. (App.48). Waters was never contacted by Sheaffer concerning the contents of the letter and Sheaffer did not call Waters as a witness at the petitioner's trial. (App.48).

Potenzo pled guilty to the murders and pursuant to a plea agreement to avoid the death penalty testified against the petitioner. Potenzo testified that the petitioner participated in the robbery. The petitioner testified and denied any prior knowledge of or participation in Potenzo's crimes. The petitioner testified that he was doing plumbing work at the lounge and presented witnesses and documentary evidence to support his employment by the lounge. (App. 6-9). Thus, the jurors were faced with a credibility choice between Potenzo and the petitioner. The State relied heavily upon the challenged statements obtained from the petitioner. The jury found the petitioner guilty as charged. (App. 7, 9, 51).

The petitioner appealed and based upon *Edwards* challenged the state court's denial of his motion to suppress the statements taken after he requested counsel. (App. 9). The state appellate court affirmed without an opinion. *Cammarano v. State*, 494 So. 2d 219 (Fla.5th DCA 1986).

The petitioner filed for post-conviction relief in the state trial court and alleged that Sheaffer afforded him ineffective assistance of counsel. (App. 9). Citing the Sixth Amendment, the petitioner pointed to specific deficiencies by Sheaffer,

including his failure to interview Waters or call him to testify that Potenzo told him he was falsely implicating the petitioner in order to avoid the death penalty. The petitioner specifically claimed that Sheaffer's ineffectiveness was due in part to the investigation by the prosecutor that was hanging over his head during the petitioner's prosecution. (App.52).

An evidentiary hearing was held. Waters testified that he wrote a letter to the jail chaplain stating that while he and Potenzo were incarcerated together, Potenzo stated that the petitioner did not participate in the murders or the robbery. (App. 11, 54). Waters stated that he was never contacted by Sheaffer or an investigator. (App. 11, 54). Waters testified that he would have testified at the petitioner's trial. (App. 11, 54).

Sheaffer testified with regard to the prosecutor's investigation of him as follows: "I was concerned about the effect of the investigation on two fronts, one my immediate representation [of the petitioner], and two, my future career as a criminal defense attorney in Orange County. You might as well take my license if you take my reputation." (App. 55).

Sheaffer claimed that he made a tactical decision not to present Waters as a defense witness based upon consultation with two attorneys familiar with Waters and instead presented another witness on the subject. Sheaffer claimed he could not recall the attorneys' names. The judge ordered Sheaffer to recall their names following a recess. After the recess, Sheaffer named two attorneys. The state judge denied relief. Thereafter, the petitioner contacted the two attorneys and moved for rehearing to present their testimony. The two attorneys testified at the rehearing and refuted Sheaffer's testimony. (App. 15, 56). Post-conviction relief was again denied by the state trial judge. (App. 14, 57). The intermediate appellate court affirmed, *Cammarano v. State*, 548 So. 2d 671 (Fla.5th DCA 1989), and the state supreme court denied review. *Cammarano v. State*, 551 So. 2d 460 (Fla.1989).

The petitioner filed a second request for post-conviction relief based upon an affidavit executed by Potenzo in which he recanted his testimony at the petitioner's trial. (App. 16, 57). At

an evidentiary hearing, Potenzo refused to testify and the recantation was ruled inadmissible. (App. 16-17). The judge also ruled inadmissible testimony from Waters. (App. 59). Post-conviction relief was denied and the appellate court affirmed. (App. 17).

The petitioner sought habeas corpus relief pursuant to 28 U.S.C. §2254 in the United States District Court for the Middle District of Florida. On September 2, 1998, the district judge entered a written order denying relief without an evidentiary hearing. (App. 2-27). Relying upon *Bergman v. Duncan*, 86 F.3d 1161 (9th Cir.1996) [unpublished], the district judge found that the petitioner failed to exhaust his Sixth Amendment claim of ineffective assistance of counsel on the ground that a claim of a violation of the right to conflict-free counsel must be raised separately from a claim of a violation of the Sixth Amendment right to effective assistance of counsel. (App. 17-29).

With regard to the *Edwards* claim, the district judge held, in pertinent part, that assuming there was constitutional error, it was harmless for two reasons: first, under the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the error did not have a "substantial and injurious effect or influence in determining the verdict" (App. 24); and second, under *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the unconstitutionally obtained statements could still be used to impeach the petitioner if he testified. (App. 25).

The petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed "on the basis on [sic] the district court's well-reasoned Order dated September 2, 1998." (App. 1).

ARGUMENT

I.

WHERE THERE IS NO EVIDENCE THAT THE STATE COURT MET ITS OBLIGATION TO APPLY THE HARMLESS BEYOND A REASONABLE DOUBT STANDARD OF *CHAPMAN v. CALIFORNIA* IN A STATE PRISONER'S DIRECT APPEAL, THE HARMLESS ERROR STANDARD OF *CHAPMAN*, RATHER THAN *BRECHT v. ABRAHAMSON*, APPLIES TO THE PRISONER'S FEDERAL HABEAS CORPUS ACTION.

At the petitioner's state trial, the State introduced into evidence statements obtained from the petitioner after his request for counsel was ignored by the police thereby violating *Edwards v. Arizona*, 451 U.S. at 484-85 ("[H]aving expressed his desire to deal with the police only through counsel, [an accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."). After exhausting the *Edwards* issue in the state courts, the petitioner sought federal habeas corpus relief. The constitutional error in admitting the statements was a trial error and therefore subject to harmless error review. See *Arizona v. Fulminante*, 499 U.S. 279, 306-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The district judge, assuming that *Edwards* was violated, found the admission of the statements to constitute harmless error under this Court's decision in *Brecht v. Abrahamson*, *supra*.

In *Brecht*, a state prisoner sought federal habeas corpus relief because the State violated due process under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) which prohibits references to an accused's post-*Miranda* silence. The State Supreme Court found that the error was "harmless beyond a reasonable doubt" under the standard set

forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The federal district court set aside the conviction and the Seventh Circuit reversed. This Court granted review to determine whether the *Chapman* harmless-error standard applies in determining whether the prosecution's violation of *Doyle* warrants federal habeas corpus relief. This Court held in *Brecht* that it does not and that the appropriate standard is the harmless error standard from *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 1248, 90 L.Ed.2d 1557 (1946), which asks whether the error "had substantial and injurious effect or influence in determining the jury's verdict." In so deciding, this Court noted that the *Chapman* standard, which the petitioner urged, applies to direct and not collateral review. However, the decision in *Brecht* assumed that the state courts would meet their obligation to apply the *Chapman* standard in direct appeals from denials of constitutional errors. This Court reasoned as follows:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. [citation omitted] For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

Brecht, 507 U.S. at 636, 113 S.Ct. at 1721. In the case at bar, there is no indication that the state courts applied *Chapman.*

In the wake of *Brecht*, the following question arose: Does the *Brecht/Kotteakos* harmless error standard still apply in a case where there is no evidence that the state courts met their obligation to apply the *Chapman* standard? The Eighth Circuit answered the question in the negative. See *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir.1993). The other

circuits that have weighed in on the issue have responded in the affirmative. See, *e.g.*, *Sherman v. Smith*, 89 F.3d 1134, 1141 (4th Cir.1996); *Gilliam v. Mitchell*, 179 F.3d 990, 994-95 (6th Cir.1999); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir.1995); *Bains v. Cambra*, 204 F.3d 964 (9th Cir.2000); *Davis v. Executive Director of Dep't of Corrections*, 100 F.3d 750, 772 n.20 (10th Cir.1996); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir.1995). In the case at bar, consistent with the binding precedent of the Eleventh Circuit in *Horsley*, the district judge applied the *Brecht* standard. The Eleventh Circuit affirmed.

The petitioner requests that this Court grant review to resolve the conflict among the circuits.

II.

ERROR CANNOT BE FOUND HARMLESS UNDER *BRECHT v. ABRAHAMSON* BY ISOLATING THE PROSECUTION'S CASE WITHOUT ANY REGARD TO THE DEFENSE.

Even if *Brecht* supplies the appropriate harmless error standard in the case at bar, review is sought because that standard was improperly applied. The district judge found the *Edwards* violation harmless by isolating three aspects of the State's case, namely, Potenzo's testimony for the State, the petitioner's presence at the scene, and the petitioner's possession of the bag of money, and did so without any regard to the defense. However, as noted, the petitioner's testimony flatly contradicted Potenzo's, who admittedly testified against the petitioner to avoid the death penalty. The petitioner's presence at the scene was an undisputed issue and consistent with his defense that he was there on a plumbing job without knowledge of Potenzo's plan to rob. Also, the petitioner's possession of the bag of money was explained as an event which took place after Potenzo committed the crimes.

Although less onerous to the prosecution than the "harmless beyond a reasonable doubt" standard of *Chapman*, the *Brecht* standard is nevertheless "demanding." See *Brecht*, 507 U.S. at 641, 113 S.Ct. at 1723 (Stevens, J., concurring). Consequently, it is only when a judge is "'sure that the error did not influence the jury, or had but very slight effect'" that an error should be deemed harmless under *Brecht*. *O'Neal v. McAninch*, 513 U.S. 432, 437, 115 S.Ct. 992, 995, 130 L.Ed.2d 947 (1995) (quoting *Kotteakos*, 328 U.S. at 764, 66 S.Ct. at 1248).

Here, the district judge erroneously applied *Brecht* by considering only portions of the State's case without any regard to the defense or the impact of the challenged statements. This is precisely what this Court instructed the courts not to do. See *Kotteakos*, 328 U.S. at 765, 66 S.Ct. at 1248 ("The inquiry cannot be merely whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."). In this case, the prosecution turned almost entirely upon the credibility of its star witness, Potenzo, who possessed motives for falsely testifying against the petitioner and whose critical testimony as to the petitioner's purported knowledge was uncorroborated save by one of the challenged statements. Without the error of the admission of the challenged statements, the jurors were left to decide between the credibility of Potenzo and the petitioner. Under such facts, the error cannot be deemed harmless. See *Kotteakos*, 328 U.S. at 765, 66 S.Ct. at 1248 (if the court cannot conclude "that the judgment was not substantially swayed by the error," the error is harmful.).

Review is sought to resolve the conflict with *Brecht* and *Kotteakos*.

III.

A VIOLATION OF *EDWARDS v. ARIZONA* IS NOT HARMLESS *PER SE* UNDER *HARRIS v. NEW YORK.*

The district judge ruled that assuming the petitioner's statements were "taken in violation of *Edwards v. Arizona*, [they] were also admissible to impeach [the petitioner pursuant to] *Harris v. New York.*" (App. 25). The court of appeals approved the ruling.

The ruling assumes that the petitioner would have taken the witness stand even if his statements had been suppressed or, in the event of retrial and suppression, the petitioner would again take the witness stand. The ruling is erroneous for several reasons. First, it is pure speculation that the petitioner would so testify. Second, it is the prosecution who bears the burden of proving that its illegal introduction of the petitioner's statements did not induce his testimony at his trial. See *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). The State made no such showing in the record. Finally, the ruling effectively overrules *Edwards* by rendering harmless *per se* any violation thereof through a potential application of *Harris*.

For any or all of these reasons, this Court is requested to grant review.

IV.

A STATE PRISONER, WHO PRESENTED THE STATE COURTS WITH THE CLAIM THAT HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BECAUSE THE PERFORMANCE OF TRIAL COUNSEL WAS IMPAIRED BY AN INVESTIGATION INTO TRIAL COUNSEL'S ALLEGED CRIMINAL CONDUCT BY THE SAME PROSECUTOR WHO BROUGHT THE CHARGES AGAINST THE PRISONER, IS NOT BARRED FROM SEEKING FEDERAL HABEAS CORPUS RELIEF FOR DENIAL OF HIS SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL ON THE GROUND THAT HE WAS REQUIRED TO PRESENT THE STATE COURTS WITH A SEPARATE SIXTH AMENDMENT CLAIM ALLEGING SPECIFICALLY THAT HIS COUNSEL LABORED UNDER A CONFLICT OF INTEREST.

In the state courts, the petitioner unsuccessfully claimed he was denied effective assistance of counsel in violation of the Sixth Amendment. The petitioner argued, *inter alia,* that his counsel's performance was impaired due to an investigation by the same prosecutor who brought the charges against the petitioner. The petitioner pointed to specific instances of his counsel's ineffectiveness, including counsel's failure to interview or present to the jury a witness to whom the prosecution's star witness had recanted his accusations against the petitioner. The petitioner sought federal habeas corpus relief but the district court ruled that the petitioner's Sixth Amendment ineffective assistance of counsel claims in the state courts failed to exhaust the claim that he was denied his

Sixth Amendment right to conflict-free counsel.[1] The district judge, citing as its only authority an unpublished decision of the Ninth Circuit, ruled that a claim of the denial of the Sixth Amendment right to conflict-free counsel must be presented to the state courts, for the purposes of exhaustion, separately from a claim of denial of the Sixth Amendment right to effective assistance of counsel.[2] The court of appeals affirmed on the ground that the district court had rendered a "well-reasoned Order...". (App.1).

In *Strickland*, this Court held that a defendant suffers ineffective assistance of counsel in violation of the Sixth

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[1]In *Ex Parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886), this Court first announced the exhaustion requirement by holding that in order to obtain federal habeas corpus relief, a state prisoner must first exhaust his remedies in state court by giving the state courts an opportunity to act upon his claims. The exhaustion requirement is codified at 28 U.S.C. §2254. (b)(1).

[2]The district judge reasoned as follows:

> [The petitioner] referenced the conflict of interest claim only as part of his argument that Sheaffer [the petitioner's trial counsel] did not properly investigate the case and failed to call witnesses at trial. By failing to raise the conflict of interest claim as a separate issue under *Cuyler [v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)] or *Strickland [v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], [the petitioner] deprived the trial court of the opportunity to ascertain the extent of the investigation of Sheaffer, whether the investigation created an actual conflict of interest between Sheaffer and [petitioner], and whether the actual conflict of interest, if one existed, adversely affected Sheaffer's performance. See, *e.g.*, *Bergman v. Duncan*, 86 F.3d 1161 (9th Cir.1996) [unpublished] (text found at 1996 WL 272546) (conflict of interest is an issue that must be raised separately from a general ineffective assistance of counsel claim).

(App. 18).

Amendment if his attorney has (1) a potential conflict of interest and the defendant proves prejudice, or (2) an actual conflict of interest, in which case prejudice is presumed and the defendant need only show the conflict adversely affected counsel's performance. As long ago as *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942), this Court recognized that the right to conflict-free assistance of counsel is a component of the Sixth Amendment right to effective assistance of counsel. More recently, in *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), this Court stated: "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to [illegible]sentation that is free from conflicts of interest." *Wood*, 450 U.S. at 271, 101 S.Ct. at 1104 (citing *Cuyler* and *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)).

In this case, it is true that the petitioner did not invoke the term "conflict of interest" in the state courts. But this Court has held that to "fairly present" a claim, petitioners need only present their issues to the state courts in such a manner that they are "alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). See also *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). The exhaustion rule, which is not a jurisdictional requirement, *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987), does not require that a petitioner cite to the state courts "book and verse" of the federal constitution to satisfy the exhaustion requirement. *Picard*, 404 U.S. at 277, 92 S.Ct. at 509.

The claim presented by the petitioner to the state courts fairly alerted them that he was invoking his Sixth Amendment right to conflict-free counsel. For example, the petitioner made the following arguments to the state trial judge in the post-conviction attack upon the effectiveness of his trial counsel:

> During the course of the trial in this matter, many unusual and irregular events occurred which may have impaired trial counsel's ability to perform effectively. State Attorney Sharpe initiated a proceeding to determine whether William Sheaffer and his investigator had offered a witness money in return for favorable testimony. Certainly, the attempt by the Assistant State Attorney to have Mr. Sheaffer removed as trial counsel on allegations of misconduct, created an atmosphere in which anyone would have difficulty performing.

(App. 52).

> Mr. Sheaffer was under investigation himself for possible bribery of a witness. Mr. Sheaffer was told that he should get out of the case by the very prosecutor in this case. He may not have been functioning well at all.
>
> ***
>
> [Sheaffer] was ... under the ... trauma of the investigation. [H]e was very concerned about his entire relationship with witnesses.

(App. 66-67).

> [T]he reason[] this case is so singular is that Mr. Sheaffer was himself under investigation during the most critical period of the case, immediately before ... trial and ... Mr. Sheaffer was required under his own assumption of what had to be done to hire a lawyer ... from Miami to say that [he] was not embroiled in his own defense, to say on the witness stand, "I wasn't really concerned about it," I think is really something that we cannot accept and I would

> ask Your Honor, as the trier of fact of this hearing, to take into consideration whether it was considered de minimis, so to speak, by this lawyer.

(App. 67).

> [Sheaffer] conceded that he ... had been under investigation and fortunately for him it did not result in an indictment. The very time he [Sheaffer] was representing my client who was then his client, he was certainly, very, very distracted, Your Honor.
>
> ***
>
> Mr. Sheaffer, I submit to you, Your Honor, unfortunately fell down on the job here, but not because of some strategic judgment which would be perfectly okay under the cases, [but] because of the fact he did not and could not represent the defendant the way he should have been.

(App. 67-68).

In the state appellate court on appeal from the denial of his post-conviction attack, the petitioner argued in his brief that the prosecutor's criminal investigation of Sheaffer "undoubtedly affected [Sheaffer's] ability to function effectively during the course of preparing [petitioner's] case." (App.68). The petitioner further argued in his brief as follows:

> It is clear from the record that just prior to the information pertaining to [the witness] coming to Sheaffer's attention, Sheaffer was forced to defend himself against allegations of criminal impropriety made by [the] Assistant State Attorney [who] initiated a proceeding aimed at

> having Sheaffer removed as [petitioner's] counsel. The allegation was that Sheaffer and his investigator had offered money to a witness in return for favorable testimony. Sheaffer defended himself with help from the National Association of Criminal Defense Lawyers. This action against Sheaffer created an atmosphere in which any person would have had difficulty performing. At a minimum, it certainly had a chilling effect on Sheaffer's initiative to interview another potential witness.....

(App. 68-69).

In sum, the Ninth Circuit in *Bergman*, and now the Eleventh Circuit in the case at bar, hold that a habeas petitioner who presented to the state courts a conflict of interest claim as part of a claim of ineffective assistance of counsel under the Sixth Amendment has failed to exhaust state remedies. As noted, this view conflicts with this Court's jurisprudence regarding both the Sixth Amendment and exhaustion. This Court is requested to grant review to resolve the conflict.

V.

AN ACTUAL CONFLICT OF INTEREST ARISES WHEN AN ATTORNEY IS BEING INVESTIGATED BY THE SAME PROSECUTOR WHO IS PROSECUTING THE ATTORNEY'S CLIENT AND THE CLIENT'S MERE KNOWLEDGE OF THE INVESTIGATION DOES NOT CONSTITUTE A WAIVER OF THE SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL.

A.

There is a split of authority regarding the burden upon a defendant who alleges that he was denied his Sixth Amendment right to conflict-free counsel on the ground that his counsel was under investigation by the prosecution. As noted, *Strickland* held that a defendant suffers ineffective assistance of counsel in violation of the Sixth Amendment if his attorney has (1) a potential conflict of interest and the defendant proves prejudice, or (2) an actual conflict of interest, in which case prejudice is presumed and the defendant need only show the conflict adversely affected counsel's performance. The circuits are split over what burden a defendant bears for relief when his counsel was under investigation by the same prosecutor who brought the charges against the defendant.

In *United States v. McLain*, 823 F.2d 1457 (11th Cir.1987), the defendant's counsel was under investigation by the same United States attorney's office prosecuting the defendant. Certain assistant United States attorneys suggested to the defendant's counsel that his own indictment could be delayed until after the completion of the defendant's trial. The Eleventh Circuit found an actual conflict of interest. Specifically, the court held that because it was in counsel's best interest to have a lengthy trial, he could not have adequately represented his client in exploring possible plea negotiations.

In *United States v. White*, 706 F.2d 506 (5th Cir.1983), counsel was under investigation by a grand jury regarding his participation in his client's escape from jail. The Fifth Circuit found that these circumstances created an actual conflict of interest and reversed based upon the defendant's invalid waiver of the conflict.

In *United States v. Montana*, 199 F.3d 947 (7th Cir.1999), the court of appeals expressly disagreed with *McLain*, holding instead that the defendant is required to prove that his counsel operated under "actual fear of retaliation". *Id.* at 949.

Review is sought to resolve the conflict among the circuits.

B.

In the case at bar, the district court ruled that because the petitioner had notice of the allegations against his counsel, the rule of *McLain* did not apply. (DC at n.2). In its affirmance, the court of appeals approved the reasoning of the district court.

The conclusion reached by the district court would only be true if the notice to the petitioner constituted a waiver of his right to conflict-free counsel. However, a waiver cannot be established through presumed acquiescence. See *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), overruled on other grounds by *Edwards*. There is no knowing and intelligent waiver by the petitioner of his Sixth Amendment right to conflict-free counsel. As noted, no judicial inquiry whatsoever was conducted of the petitioner. Moreover, the law governing waiver is such that even if the petitioner had voiced approval of his counsel, which he did not, that would not have sufficed for a finding of a waiver. Cf. *United States v. Cronic*, 466 U.S. 648, 657 n.21, 104 S.Ct. 2039, 2046 n.21, 80 L.Ed.2d 657 (1984) ("If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. It is for this reason that

we attach no weight to ... respondent's expression of satisfaction with counsel's performance at the time of trial...."). Review is sought to resolve the issue of waiver.

VI.

A TRIAL COURT'S DUTY TO INITIATE AN INQUIRY INTO A CONFLICT OF INTEREST ARISES WHEN THE COURT IS PLACED ON NOTICE THAT COUNSEL FOR AN ACCUSED IS BEING INVESTIGATED BY THE SAME PROSECUTOR WHO BROUGHT THE CHARGES AGAINST COUNSEL'S CLIENT.

Where a trial judge is sufficiently apprised of the mere possibility of a conflict of interest, the judge has a duty to conduct an inquiry to determine whether counsel is operating under an actual conflict, potential conflict, or no conflict at all. See *Wood*, 450 U.S. at 272-73, 101 S.Ct. at 1103-04; *Cuyler*, 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holloway*, 435 U.S. at 484, 98 S.Ct. at 1178-79. The trial court's obligation arises from the "independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment." *Wheat v. United States*, 486 U.S. 153, 161, 108 S.Ct. 1692, 1698, 100 L.Ed.2d 140 (1988). When a possible conflict has been ignored, reversal is automatic. *Wood*, 450 U.S. at 273 n.18, 101 S.Ct. at 1097 n.18; *Cuyler*, 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holloway*, 435 U.S. at 488, 98 S.Ct. at 1180-81.

In this case, an important question for resolution by this Court is whether the trial court's duty to initiate such an inquiry arises when the court is placed on notice that counsel for an accused is being investigated by the same prosecutor who brought the charges against counsel's client.

In *Wood*, this Court found that "the fact that the State raised the conflict problem explicitly and requested that the court look into it" placed the trial judge on notice of the need

for an inquiry. *Id.*, at 273, 101 S.Ct. at 1104. Similarly here, the State filed a motion to disqualify the petitioner's trial counsel on the ground that he was being investigated for bribery of a prosecution witness and that he might be called as a witness in the petitioner's trial.

Here, as in *Wood,* the trial judge was alerted to the conflict by the State's motion to disqualify and was therefore obligated to conduct an inquiry of the petitioner into the conflict. However, no such inquiry took place. Review is sought to resolve this important issue.

Respectfully submitted,

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FILED (2)

No. 00-304 AUG 14 2000

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH CAMMARANO,

Petitioner,

v.

MICHAEL W. MOORE, Secretary, Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3357
D.C. Docket No. 95-00696-CV-ORL-22A

JOSEPH CAMMARANO,
Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary,
Department of Corrections,
Respondent-Appellee.

Appeal from United States District Court
for the Middle District of Florida

Entered: April 27, 2000

Before ANDERSON, Chief Judge, BLACK, Circuit Judge, and HALL*, Senior Circuit Judge.

PER CURIAM:

We affirm on the basis on the district court's well-reasoned Order dated

September 2, 1998.

AFFIRMED.

---

* Honorable Cynthia Holocomb Hall, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 95-0696-Civ-Orl-22A

JOSEPH CAMMARANO,

Plaintiff,

-vs-

HARRY SINGLETARY, as Secretary of the Department of Corrections,

Defendant.

Entered: September 2, 1998

ORDER

This cause came on for consideration without oral argument on Plaintiff's Petition for Writ of Habeas Corpus by a Person in State Custody (Docket No. 27) and supporting memorandum of law (Docket No. 28). I have also considered Defendant's Response to Petition (Docket No. 38), the Petitioner's Reply (Docket No. 45), the notices of supplemental authority (Docket Nos. 446, 48, 49 & 50), the Errata to Petitioner's Reply (Docket No. 47) and the supporting appendix.

I. FACTS AND PROCEDURAL HISTORY.

Joseph Cammarano ("Cammarano") was arrested on May 24, 1984. (App. 1571, 1591). An indictment against Cammarano and Dennis Potenzo ("Potenzo"), also known as Dennis Perry, was returned on July 10, 1984, charging both

defendants with two counts of murder in the first degree and one count of armed robbery. (App. 2333-34, Tab G at 425). Cammarano was represented pretrial, at trial, and on direct appeal by William J. Sheaffer ("Sheaffer").

A. *Motions to Suppress.*

Before trial, the defense filed motions to suppress Cammarano's statements both as the fruit of an illegal stop and because some of them were made in violation of his right to have counsel present. The Circuit Court held a suppression hearing. (App. 1567-1800, 1899-1912).

Cammarano contended that he had been illegally detained by the police on the day of his arrest because they did not have a sufficient basis to stop and make inquiry of him. Therefore, he argued, all evidence obtained as a result of the illegal detention was taken in violation of his Fourth Amendment rights.

Orlando Police Officer Richard Albert testified that he saw Cammarano and Potenzo walking down a street near the Southern Nights lounge in an area that had a high number of commercial and residential burglaries. (App. 1578-79). Cammarano was carrying a bag over his shoulder and was supporting the contents of the bag with his hand, as if it were very heavy, *(Id.)*. Potenzo was carrying a towel. (App. 1579). The officer stopped the two men to determine why they were walking in that area. (App. 1581). Potenzo dropped the towel before coming to speak with the officer. (App. 1577-86).

Cammarano told the officer that their car had run out of gas around the corner. (App. 1582). The officer noticed a metal object in the Cammarano's waistband, which appeared to him to be a weapon. (App. 1584). When Cammarano subsequently put down the bag he was carrying, the officer saw wrapped currency in the bag. (App. 1585-86). The Officer used his radio to call for assistance, stating that he had two burglary suspects. (App. 1584). At that

point, Potenzo fled. (App. 1585). The officer arrested Cammarano for a possible burglary. (App. 1591). The object in Cammarano's waistband was a pry bar. (App. 1588). Thereafter, the officer found a gun under the towel that Potenzo had dropped. (App. 1587). The Court denied the motion to suppress based on an illegal stop without making findings of fact. (App. 2447).

Cammarano also argued that, after he had made an initial statement to police and signed a waiver of his *Miranda* rights, he had asked to speak with an attorney but that the interrogation continued. Officer Jeffrey Gauntlett testified that he advised Cammarano of his *Miranda* rights at the scene of the arrest. (App. 1639-40, 1651). Cammarano stated that he wanted to talk to the officer. (App. 1640). Cammarano told Gauntlett that he had come from the Southern Nights lounge where he had been working. *(Id.)*. He stated that Potenzo had forced him outside and that, while outside, he heard shots fired in the building. (App. 1640-41). He said that Potenzo forced him to walk down the street carrying the bag. (App. 1641).

Cammarano was then taken to the Municipal Justice Building, where he was again advised of his *Miranda* rights. (App. 1642). Cammarano signed a document indicating that he waived those rights and agreed to speak with the police. *(Id.)*. He made another statement and requested to take a polygraph test, which was administered to him. (App. 1644). Gauntlett testified that Cammarano had not asked for an attorney up to this point. (App. 1645).

Gauntlett testified that after the polygraph test was administered, Cammarano told him that his attorney was William Sheaffer, and he asked whether he had the right to an attorney. (App. 1654-55). In contrast, Cammarano testified that he had asked to speak to Sheaffer after he got to the Municipal Justice Building and that he repeated that request while he was held at this building. (App. 1902-03).

Gauntlett testified that he told Cammarano that he had the right to have his attorney present, then Gauntlett left

the room. *(Id.)*. When Gauntlett returned to the interview room, he asked whether Cammarano wanted to make a statement. (App. 1656). Cammarano said that he did. *(Id.)*. Each time Cammarano made a statement, his facts changed somewhat. Ultimately, Cammarano admitted that he and Potenzo had discussed a robbery of the bar the night before and that Potenzo had talked about shooting someone. (App. 1013, 1015-16). Cammarano also admitted that he thought that there would be a robbery that morning. (App. 1017). Cammarano also signed a consent for the police to search his apartment and his car. (App. 1681).

The Circuit Court denied the motion to suppress the statements without making findings of fact. (App. 2447).

B. *Motion to Disqualify Sheaffer.*

On March 22, 1995, the State of Florida filed a Motion to Disqualify Counsel. (App. 2434). The motion stated that a witness for the State, Daniel Sydow, alleged that Sheaffer and his private investigator had made "promises, inducements and representations" to Sydow to influence him to withhold or falsify information in Cammarano's case. *(Id.)*. The State sought to disqualify Sheaffer as Cammarano's counsel because Sheaffer might be called as a witness to rebut Sydow's allegations. *(Id.)*.

The Circuit Court held a hearing on this motion on March 26, 1995. (App. 2274). Cammarano was present at this hearing. (App. 2276). Counsel for Sheaffer argued that even if a witness had to be called to rebut Sydow's allegations, Sheaffer's investigator was present during all conversations between Sheaffer and Sydow and, therefore, the investigator could testify rather than Sheaffer. (App. 2295). Counsel for Sheaffer also represented to the Court in Cammarano's presence that Cammarano waived his right to conflict-free counsel. (App. 2296-97, 2306). The Circuit Court denied the motion to disqualify Sheaffer because he would not be required to testify and because Cammarano

wished to proceed with counsel of his choice. (App. 2306-07).

C. *Trial.*

Potenzo pleaded guilty and he testified against Cammarano at trial. (App. 849, 855). Potenzo testified that he and Cammarano agreed to rob the Southern Nights lounge. (App. 635). Because both he and Cammarano were known to patrons of the lounge, they agreed that whoever was present at the time of the robbery would have to be killed and that Potenzo would do the killing. (App. 635, 637). They went to Southern Nights lounge on May 24, 1984, Potenzo shot the two people who were there, Joseph Romano and James Nuss, gathered the money in the lounge and left the bar. (App. 644, 660-63).

Orlando Police Officer Richard Albert testified that he saw Potenzo and Cammarano walking down Bumby street near the Southern Nights lounge on the May 24, 1984. (App. 312). Cammarano was carrying a blue bag that appeared to be heavy because he was holding the bottom with his hand. (App. 315). Potenzo was carrying a towel. (App. 312, 315). When Albert stopped the men to speak with them, Potenzo dropped the towel. (App. 317).

Cammarano told Albert that they had run out of gas and that they were walking back to the car. (App. 317). Albert saw a metal object protruding from Cammarano waistband, which he believed could be a weapon. (App. 319). Albert also saw money and bank bags in the blue bag Cammarano was carrying. (App. 320). Albert called for back-up assistance, indicating that he might have two burglary suspects. (App. 319-20). At that point, Potenzo fled.

Albert drew his gun on Cammarano and determined that Cammarano had a pry bar in his waistband. (App. 321-22). He arrested Cammarano, handcuffed him, and placed him in the police car. (App. 323). Albert lifted up the towel

Potenzo had dropped in front of the car and saw a gun under it. (App. 324). He also searched Cammarano and found that he was carrying a pair of black vinyl gloves and a large buck knife. (App. 325).

Officer Jeffrey Gauntlett testified that he read Cammarano his *Miranda* rights after he was arrested. (App. 971). Cammarano agreed to waive those rights and make a statement. (App. 971-72). Cammarano stated that he was in the Southern Nights lounge to do plumbing work that morning when someone came in and robbed the bar. (App. 973). Cammarano heard shots fired inside the bar. *(Id.)*. The robber forced him outside and made him carry the blue bag at gunpoint. *(Id.)*.

Cammarano was then taken to the Municipal Justice Building.(App. 330). There, Cammarano was questioned by several officers and made several conflicting statements, all of which were introduced against him at trial. (App. 976-83, 1009-20). In one of these statements, Cammarano admitted that he and Potenzo, who he referred to as Perry, had talked about robbing the lounge. (App. 1015-17).

The only witnesses called by the State who placed Cammarano at the scene of the crime were some bystanders who saw Cammarano and Cammarano's car near the Southern Nights lounge on May 24, 1998. (App. 386-410, 412-447). Other witnesses confirmed that Cammarano had been doing plumbing work at the Southern Nights lounge. (App. 870, 888). A suitcase was found in the trunk of Cammarano's car. (App. 1030). That suitcase contained ammunition, a gun cleaning kit, a holster and a box for a gun. (App. 1032). The suitcase also contained more than a dozen shirts and seven pairs of pants. (App. 1032-33).

Julie Kerce testified that she and Cammarano were close friends. (App. 929). She and Cammarano had plans to go to the beach on May 24, 1984, but she had to cancel through plans because she had to work. (App. 930, 934). About three days after his arrest, Cammarano told Kerce that he had been in the Southern Nights lounge on May 24 and

that he heard shots fired. (App. 933). He also told her that Potenzo held a gun on him and made him carry the blue bag containing the money. *(Id.)*. Pursuant to cross-examination by Sheaffer, Kerce testified that she and Cammarano made alternate plans to have dinner the evening of May 24. (App. 934). She called him at home on May 24 but only reached his answering machine. (App. 935). They did not go to dinner that evening. (App. 936).

The defense called Michael Caripy, who was in prison with Potenzo. (App. 1151-52). Potenzo told Caripy that he did the shooting and that Cammarano was in another room when it occurred. (App. 1155). Potenzo also told him that he was testifying against Cammarano because the State had threatened to reinstate the death penalty against him if he did not do so. (App. 1157).

Cammarano also testified. (App. 1186). He stated that he went to the Southern Nights lounge on the morning of May 24, 1984, do plumbing work, (App. 1208), and that he had previously purchased supplies to do this work. (App. 1254). A representative from the supply company testified and produced receipts of plumbing supplies purchased on May 21, 1984. (App. 1413-18; 1422-26).

On the way to work, Cammarano's car broke down at the place where it was found by the police. (App. 1215). Cammarano testified that he was working with James Nuss in the ladies bathroom of the Southern Night lounge when he heard a shot fired. (App. 1231). Cammarano left the ladies room, but Nuss stayed inside. (App. 1294). Potenzo then went into the ladies room. (App. 1295). Cammarano left the bar. Potenzo followed shortly thereafter. (App. 1295-96). Potenzo threw the blue bag to Cammarano as they walked down the street. (App. 1296).

Cammarano was questioned about the various conflicting statements he made to the police. Cammarano said that he gave false statements to the police when he was arrested because he was scared. (App. 1211). He also testified that he had clothes in his suitcase from a trip he had

taken, (App. 1204), but he denied putting ammunition, gun cleaning equipment, a gun box and the holster in his suitcase. (App. 1206).

Cammarano was found by the jury to be guilty of two counts of first degree murder and one count of armed robbery. (App. 1560-61). The Circuit Court judge sentenced him to life imprisonment on both of the murder counts, which sentences were to be served concurrently. (App. 2005).

D. *Direct Appeal.*

On December 4, 1985, Cammarano filed his appellate brief with the Fifth District Court of Appeals, claiming the following errors occurred in the trial court below: (a) admission of tangible items and tests performed on these items which were illegally seized; (2) admission of oral statements made by Cammarano to law enforcement officers; (3) refusal to admit hypnotic sessions; (4) refusal to admit testimony of Dr. Lindenfeld as to statements made by Cammarano during hypnotic sessions; (5) admission of evidence of other wrongdoings of Cammarano; (6) denial of Cammarano's request for a new trial based on juror misconduct; and (7) denial of Cammarano's motion for a new trial based on the state's violation of discovery rules by withholding exculpatory evidence. (App., Tab E, Tab F).

E. *Post-Appeal Motions.*

1. <u>First Rule 3.850 Motion.</u>

On May 20, 1986, two new attorneys for Cammarano, Gary Weiner and Ira Anolik, filed a Motion to Vacate Judgment and Sentence Pursuant to Florida Rule of Criminal Procedure 3.850 Based Upon Denial of Effective Assistance of Counsel. (App.427). In this motion, defense counsel argued that Sheaffer rendered ineffective assistance

of counsel to Cammarano because of the following acts or omissions: (1) failure to subpoena or depose essential witnesses; (2) failure to investigate to ascertain exculpatory evidence and plausible line of defense; (3) failure to present exculpatory evidence and plausible lines of defense; (4) failure to apprise Cammarano of information gathered during a pretrial investigation; (5) failure properly to supervise his private investigator; and (6) failure to communicate a plea offer to Cammarano. *(Id.)*. The Circuit Court held a hearing on the 3.850 motion in September, 1987. (App., Tab G).

A. Plea Offers.

The prosecutor at trial, William Sharpe, testified that he made a plea offer to Sheaffer in Cammarano's presence before trial. (App., Tab G at 38-39). Sheaffer confirmed that the prosecution had offered Cammarano life imprisonment without possibility of parole for twenty-five years if he pleaded guilty. *(Id.* at 224). Because this offer was made, in Sheaffer's recollection, after the State had indicated that the State was not seeking the death penalty, Sheaffer recommended to Cammarano and his father that they reject the plea because the offered penalty was the most severe Cammarano could receive even if convicted after trial. (App., Tab G at 224-25, 248-54). Laurie Wheeler, Scheaffer's legal assistant, testified that she had discussed a plea offer made in approximately May, 1985, with both Cammarano and his father and that Cammarano was fully aware of that offer. *(Id.* at 287-91).

B. Allegations against Sheaffer

During the 3.850 motion hearing, counsel for Cammarano questioned Sharpe about his pretrial motion to disqualify Sheaffer. (App., Tab G at 55). Sharpe testified that he based the motion on information from an inmate at the jail, Daniel Sydow, who Sheaffer had interviewed. *(Id.* at

55). Sharpe further testified that the information was not used at trial. *(Id.)*. He confirmed, however, that the State had questioned a number of witnesses interviewed by Sheaffer to determine whether any improper inducements had been offered to them to influence their testimony. (*Id.* at 59-60). Sheaffer testified that he was concerned about the investigation as it might affect his reputation in the community, but that it did not influence the defense he presented for Cammarano because there was no substance to Sydow's allegation. *(Id.* at 282-83).

C. Failure to Investigate and to Call Witnesses.

(i) *Hinton Waters.*

Hinton Waters testified that about May 22, 1985, he wrote a letter to Dan Matsche stating that while Waters and Potenzo were incarcerated together, Potenzo told him that Cammarano did not participate in the charged crimes. (App., Tab G at 131, 138, 443-45). Thereafter, Waters was not contacted by Sheaffer or his investigator. *(Id.* at 135). Waters stated that he would have been willing to testify at Cammarano's trial. *(Id.)* Waters testified that he thought he had been unjustly convicted, "railroaded" to use his terms, of the crime for which he was serving a sentence of incarceration. *(Id.* at 140).

Sheaffer testified that he had been a criminal defense attorney for over ten years. (App., Tab G at 193-94). He had tried over 100 jury trial and approximately six capital cases. *(Id.)*. Sheaffer was retained to represent Cammarano at least a year before the case went to trial. (Id. at 196). Sheaffer successfully moved for Cammarano's release on bond based on statements of witnesses who said that the main witness against Cammarano, Dennis Potenzo, had recanted his story. (Id at 197- 98). Sheaffer met with Cammarano frequently at the beginning of his representation

of the defendant. (Id. at 198-99). When an investigator was appointed to assist Sheaffer, the investigator, Doug Pollack, met with Cammarano often while Sheaffer's contact decreased to once or twice a week. *(Id.* at 199-200).

One of the people who said Potenzo had recanted his story was Hinton Waters. (App., Tab G at 131, 138, 443-45). Sheaffer received Hinton Waters' letter from Matshce shortly after Matsche received the letter.*(Id.* at 200-01). When Sheaffer received the letter, he had already learned from a number of witnesses that Potenzo had recanted his story inculpating Cammarano. *(Id.* at 202). Waters' explanation of events as explained by Potenzo conflicted with the statement Cammarano made when he was arrested and with other facts Sheaffer had gathered during the investigation of the case. *(Id.* at 203-05). Sheaffer testified that he talked with Cammarano about Waters' letter before the trial. *(Id.* at 207, 271). Sheaffer determined that Waters had been convicted of first degree murder. *(Id.* at 208). He contacted attorneys "indirectly familiar" with Waters and determined that Waters felt he had been unjustly convicted and that he had made it his mission to show that Orange County prosecutors were more interested in railroading convictions than seeking justice. *(Id.* at 208-09). Sheaffer confirmed with other lawyers[1] in the presence of John Meehan. *(Id.* at 265-66). and with other inmates at the jail where Waters was housed that he was not truthful. *(Id.* at 211). Therefore, Sheaffer made the tactical decision not to call Waters to testify. *(Id.* at 211-14).

Rather than calling Waters, Sheaffer presented the testimony of Michael Caripy, one of the witnesses who testified about Potenzo's recantation. (App., Tab G at 209). Caripy's testimony about what Potenzo had said corresponded to the statement Cammarano made at the time

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[1] Initially, Sheaffer could not recall who these lawyers were. (App., Tab G at 262). After a brief recess, Sheaffer testified that one of the lawyers was William Kinane

he was arrested and the evidence gathered during the investigation of the case. *(Id.)*.

(ii) *Julie Kerce.*

Julie Kerce was Cammarano's girlfriend. (App., Tab G at 227). During the state's deposition of Julie Kerce, Sheaffer learned that Doug Pollack, his investigator, had an affair with her. *(Id.* at 226). Sheaffer later confirmed this with Pollack. *(Id.)*. Pollack said that he had already told Cammarano about the affair because Kerce was Cammarano's girlfriend. *(Id.* at 227). Cammarano learned before trial that Sheaffer had fired Pollack because of this affair with a potential defense witness. *(Id.* at 105-06, 293). Sheaffer retained George Proeche to continue the defense investigation. *(Id.* at 106, 237).

Julie Kerce was called by the State to testify at Cammarano's trial. *(Id.* at 229). She testified that she and Cammarano had plans to go out about the time of the robbery and murder, thus presenting the evidence the defense had sought to obtain from her. *(Id.* at 228-29). Sharpe testified that, based on his fifteen years' of experience in prosecuting and defending criminal cases, whether Kerce was called as a prosecution witness or a defense witness would not affect the outcome of the trial because the jury was presented with the information Kerce had to offer no matter who called her to testify. *(Id.* at 26-27, 67-68). Sheaffer testified that he benefitted from being able to cross-examine Kerce because he was able to ask her leading questions. *(Id.* at 231-33). He testified that there were no questions he avoided asking Kerce based on her involvement with Pollack or the investigation of Sheaffer. *(Id.* at 283).

(iii) *Receipts for Plumbing Supplies.*

Phillip Cammarano testified that he learned during the trial of his son's case that Sheaffer had not obtained copies of receipts for plumbing supplies purchased by Cammarano, which could be used to corroborate Cammarano's statement that he was doing plumbing work at the Southern Nights lounge. (App., Tab G at 81). Sheaffer testified that the receipts were not produced by the State in discovery, and that Cammarano could not remember where he purchased the plumbing supplies. *(Id.* at 235). The defense ultimately located the receipts by obtaining the check issued to pay for the supplies from Southern Nights and tracing the purchase back to the check's payee. *(Id.* at 236-37). The check was found during the trial. *(Id.* at 237) The receipts were received in evidence during the defense case. *(Id.* at 238).

D. Trial Court's Ruling.

The Circuit Court judge ruled that there was no prejudice from the failure to call Julie Kerce as a defense witness because there was no showing that Kerce knew additional facts that were not brought out during direct and cross-examination. (App., Tab G at 341). The judge similarly ruled that no prejudice had been established resulting from the introduction of the plumbing supply receipts late in the defense case. *(Id.* at 341). As to the plea offer, the judge found, pursuant to Sharpe's testimony, that any plea offer made or plea discussions by Sharpe that occurred early in the pretrial stages of the case was made in Cammarano's presence and, therefore, Cammarano was aware of the offer. (*Id.* at 342). Finally, as to the failure to call Hinton Waters as a witness, the Court concluded that Sheaffer made a tactical decision not to present Waters' testimony because it conflicted with other evidence and

statements made by Cammarano and because the defense was able to present testimony concerning Potenzo's recantation through Caripy. (*Id.* at 344-45). The Court further concluded that no evidence of prejudice resulting from the failure to call Waters had been shown. (*Id.* at 346). Accordingly, the Rule 3.850 Motion was denied.

2. Rehearing of First Rule 3.850 Motion.

Subsequently, the Circuit Court granted a motion for rehearing on the motion to vacate. (App., Tab G at 352). William Kinane and John Meehan, the attorneys who Sheaffer testified he had spoken to regarding Waters' credibility, testified. Kinane had no recollection of discussing Hinton Waters' credibility with Sheaffer. (*Id.* at 362-63). Kinane further testified that if he had had such a conversation, he would not have said anything "seriously derogatory" about Waters. (*Id.* at 27). Sheaffer confirmed that he only had a brief conversation with Kinane.

Meehan testified that he did not discuss Hinton Waters with Sheaffer. (*Id.* at 38). Sheaffer confirmed that following his testimony in the original hearing on the motion to vacate, he had spoken with Meehan and concluded that he was mistaken about having had a conversation with Meehan about Waters. (*Id.* at 393). He did not recall the name of the second attorney with whom he had spoken. (*Id.* at 394).

The Court again denied the motion to vacate, finding that Kinane did not deny that he had a conversation with Sheaffer but that Kinane simply did not recall the conversation. (*Id.* at 422). The Court affirmed its prior ruling that the defense had failed to show prejudice resulting from Sheaffer's strategic decision not to call Waters as a witness. (*Id.* at 423).

3. Appellate Court's Ruling.

Cammarano appealed the denial of the Rule 3.850 motion to the Fifth District Court of Appeals. (App., Tab G at 481). On appeal, he argued that Sheaffer's representation was ineffective because he failed to investigate the statements of and to call Hinton Waters as a defense witness, that Sheaffer's failure to monitor his investigator's activities had deprived the defense of the opportunity to call Julie Kerce as a defense witness, and that Sheaffer's failure properly to investigate deprived the defense of the use of the plumbing supply receipts until the end of its case. (App., Tab 11). The only reference to the investigation of Sheaffer by the State is the argument in a single paragraph of the brief that the investigation "had a chilling effect on Sheaffer's initiative to interview another potential witness, Hinton Waters." (*Id.* at 21). The court of appeals affirmed the Circuit Court's denial of the Rule 3.850 motion per curiam on July 18, 1989. (App., Tab K)

4. Second Rule 3.850 Motion.

On August 14, 1991, Cammarano filed a second Rule 3.850 motion. (App., Tab L). This motion was based on an affidavit by Potenzo in which Potenzo recanted his earlier testimony that Cammarano had been involved in the robbery of the Southern Nights lounge. (*Id.* at 18). The Circuit Court denied this motion, finding that it constituted an abuse of Florida's procedures for post-conviction relief. (App., Tab M). Cammarano appealed this decision to the Fifth District Court of Appeals. After oral argument, the appellate court reversed the trial court's decision and remanded the second Rule 3.850 motion to the Circuit Court for a hearing. (App., Tab O).

Accordingly, the Circuit Court held a hearing on the second Rule 3.850 motion. (App., Tab P). At that hearing, Potenzo refused to appear and testify. (*Id.* at 8). Defense

counsel tried five times to have Potenzo's affidavit admitted, but all attempts were denied under the Florida rules of evidence. (*Id.* at 32, 34, 36, 39, 40). Evidence in the form of testimony that would support the assertions in the affidavit was not admitted, but it was allowed as a proffer by the defense. (*Id.* at 49). The Circuit Court denied the second Rule 3.850 motion. (*Id.* at 180).

Cammarano appealed that decision to the Fifth District Court of Appeals, alleging only misapplication of Florida Rules of Evidence in that appeal. (App., Tab Q). Cammarano did not raise the constitutional issues of equal protection or due process violations in his initial or his reply briefs. (App., Tabs Q, S). The Fifth District Court of Appeals affirmed the order denying the second Rule 3.850 motion. (App., Tab T).

II ANALYSIS.

A. Cammarano Failed to Raise the Constitutional Issues Underlying His Actual Conflict of Interest Claim Before the State Courts, and Any Alleged Conflict of Interest Did Not Adversely Affect Sheaffer's Performance

Before the trial of Cammarano's case, a potential witness, Daniel Sydow, accused Cammarano's counsel, William Sheaffer, of offering him inducements to withhold or falsify his testimony. During the pretrial stages of the case, the same attorneys who were prosecuting Cammarano were also investigating these allegations against Sheaffer. Cammarano contends that this investigation placed Sheaffer in an actual conflict of interest with him and that he was denied effective assistance of counsel. To establish a Sixth Amendment violation in these circumstances, the defense must show that the defendant had an actual conflict of interest and that the conflict of interest adversely affected his

lawyer's performance. *Burger v. Kemp*, 483 U.S. 776, 783 (1987)(citing *Cuyler v. Sullivan*, 446 U.S. 335, 692 (1980)); *see also Strickland v. Washington*, 466 U.S. 668 (1984)(to establish ineffective assistance of counsel defendant must show counsel's errors fell below an objective standard of reasonableness and prejudiced his case).

Cammarano was aware of the allegations against Sheaffer and the pending investigation before his case was tried because he was present at the hearing on the State's motion to disqualify Sheaffer based on Sydow's allegations.[2]. Despite this notice, Cammarano did not raise this Sixth Amendment "conflict of interest" claim arising from the investigation of Sheaffer at trial or on direct appeal. More significantly, he did not raise the actual conflict of interest issue in either of his Rule 3.850 motions before the Circuit Court or on appeal of those motions. Rather, he referenced the conflict of interest claim only as part of his argument that Sheaffer did not properly investigate the case and failed to call witnesses at trial. By failing to raise the conflict of interest claim as a separate issue under *Cuyler* or *Strickland*, Cammarano deprived the trial court of the opportunity to ascertain the extent of the investigation of Sheaffer, whether the investigation created an actual conflict of interest between Sheaffer and Cammarano, and whether the actual conflict of interest, if one existed, adversely affected Sheaffer's performance. *See, e.g., Bergman v. Duncan*, 86 F. 3d 1161 (9th Cir. 1996)(text found at 1996 WL 272546)(conflict of interest is an issue that must be raised separately from a general ineffective assistance of counsel claim).

Even if this matter had been properly raised in the state court, the record does not support a finding that the

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[2] This notice to Cammarano distinguishes his case from the facts in *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987)(actual conflict when defense counsel under investigation by United States Attorney's Office failed to advise defendant of the investigation).

investigation of Scheaffer adversely affected his performance. The Circuit Court, after a hearing on a motion to disqualify Sheaffer, determined that if Sydow testified about alleged inducements, Sheaffer would not have to testify because Sheaffer's investigator was present at all meetings between Sheaffer and Sydow. Therefore, the investigator could present any rebuttal testimony required. *Cf. Beets v. Scott*, 65 F. 3d 1258, 1276 (5th Cir. 1995)(ineffective assistance of counsel claim failed when another witness could present same evidence in lieu of defense attorney's testimony). There is no suggestion in the record that Sheaffer failed to pursue plea negotiations because he was under investigation. Cammarano speculates that Sheaffer failed to investigate a letter written by Hinton Waters because he did not want to incur a further investigation of his conduct. This argument is mere conjecture, unsupported by any evidence in the record. Accordingly, even if an actual conflict of interest existed, and Cammarano had exhausted that claim in the state courts, he has failed to show that the conflict of interest adversely affected Sheaffer's performance.

B. Sheaffer's Investigation and Strategic Decisions at Trial Fell Within the Wide Range of Professionally Competent Assistance.

Cammarano's second contention is that Sheaffer provided ineffective assistance of counsel because he failed to investigate a statement made by Hinton Waters, he failed to call Hinton Waters as a witness, he failed to supervise his investigator resulting in the loss of Julie Kerce as a defense witness, and he failed to obtain plumbing supply receipts for use during the defense case. "To prove ineffective assistance of counsel, a petitioner must prove that counsel's performance was deficient and that the deficiency prejudiced the defendant.... To satisfy the prejudice prong, a petitioner

'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Waldrop v. Jones*, 77 F. 3d 1308, 1312 (11th Cir. 1996).

At the hearing on the first Rule 3.850 motion, Sheaffer testified that he made a tactical decision not to call Waters to testify because the version of events related by Potenzo to Waters was inconsistent with other evidence developed in the case and with Cammarano's statement at the time of his arrest. Instead, Sheaffer called Michael Caripy to testify that Potenzo had recanted his statement implicating Cammarano in the crimes. S heaffer explained that the story Potenzo related to Caripy was consistent with the evidence developed in the case and Cammarano's statements. The Circuit Court concluded that Sheaffer made a legitimate tactical decision and that Cammarano failed to establish prejudice from the failure to call Waters as a witness.

"The question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct." *Provenzano v. Singletary*, No. 97-2576, 1998 WL 458467, at *2 (11th Cir. Aug. 6, 1998). Cammarano does not challenge the Circuit Court's finding that the failure to call Hinton Waters was a tactical decision. Instead, he argues that because Sheaffer insufficiently investigated Waters' statements, he could not make a reasonable tactical choice. This Court must determine, therefore, "whether the strategic or tactical decision is reasonable enough to fall within the wide range of professional competence." *Id.*

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable profession judgments support the limitations on investigation." *Burger v. Kemp*, 483 U.S. at 794. In this

case, Sheaffer testified that he had identified four witnesses, one of whom was Waters, who knew that Potenzo had recanted his statement about Cammarano's involvement in the charged crimes. Of the four witnesses, the version of events Potenzo gave to Michael Caripy was consistent with other evidence developed in the case and with Cammarano's statements at the time he was arrested. Therefore, Sheaffer chose to call Caripy to testify about Potenzo's recantation. Sheaffer's explanation of the reason for this tactical decision falls well within the "wide range of professional competent assistance." *Id.* at 795.

Cammarano also has not presented any evidence that Waters' testimony would have been more persuasive than Caripy's testimony. He has, therefore, failed to show that any error in failing to investigate or call Waters at trial raises "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Waldrop v. Jones*, 77 F. 3d 1308, 1312 (11th Cir. 1996).

Similarly, Cammarano has not shown the method and timing of the introduction of Julie Kerce's testimony and the plumbing supply receipts was prejudicial to his case. Despite the affair between Kerce and the defense investigator, Kerce testified at trial as a witness for the state. Sheaffer testified that he elicited all the information he hoped to obtain from Kerce on cross-examination. Cammarano has not presented evidence that Kerce would have given additional testimony had she been called as a defense witness. The plumbing supply receipts were also introduced at trial and therefore, were before the jurors for their consideration. While Cammarano complains that the plumbing supply receipts should have been introduced earlier in the trial, he has not presented any evidence suggesting that the timing of the introduction of this evidence raises a reasonable probability that the result of the proceeding would have been different if the evidence had been introduced earlier.

C. Cammarano Had a Full and Fair Opportunity to Litigate His Fourth Amendment Claims in State Court and Admission of His Post-Arrest Statements Was, At Most, Harmless Error.

1. Fourth Amendment Claim.

Cammarano objects to the introduction of "certain incriminating statements that he allegedly made to the authorities following his unlawful arrest." (Docket No. 28 at 15). The first issue actually raised by this claim is a Fourth Amendment claim[3], because Cammarano claims that all statements he made were the result of his "unlawful arrest." The Circuit Court held an evidentiary hearing on the "unlawful arrest" issue at which Cammarano was given an opportunity to present witnesses and evidence. *(Id.)*. The court denied this motion. (App. 2381, 2447). At trial, Cammarano again objected to the introduction of these incriminating statements, but his objection was overruled. Cammarano raised this issue again on direct appeal.

In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court determined that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494 (footnotes omitted). In order to be entitled to federal habeas review of a Fourth Amendment claim, the Cammarano must demonstrate that he "was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." *Id.* at 495. Federal courts will not consider the merits of Fourth Amendment cases merely because the state courts erred in their Fourth

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[3] Cammarano alleges that the arresting officer had no rational basis to detain Cammarano or to ask for identification.

Amendment analysis. *See Swicegood v. Alabama*, 577 F. 2d 1322, 1324 (5th Cir. 1978).

Cammarano has failed to demonstrate that the hearing conducted by the trial court on his motion to suppress denied him of an opportunity for a full and fair litigation of his Fourth Amendment claim. This Court determines that Cammarano was afforded a full and fair opportunity to litigate this claim, and he should not be permitted to further relitigate the same issue. *See Harris v. Dugger*, 874 F. 2d 756, 761 (11th Cir.1989)(federal habeas petitioner, who had fully and fairly litigated his *Franks* claim in the state courts of Florida, was precluded from federal habeas review of his claim); *Boggs v. Bair*, 892 F. 2d 1193, 1200 (4th Cir. 1989)(federal habeas petitioner "was afforded every full and fair opportunity to litigate and have adjudicated the Fourth Amendment claim with respect to the search of his vehicle and ... he should not be permitted to further relitigate the same ....").

2. *Edwards v. Arizona* Claim.

Cammarano asserts that certain of his post-arrest statements were improperly admitted at trial because the police continued to interrogate him after he requested to speak with an attorney in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). At the suppression hearing, Cammarano testified that following his first voluntary statement to the police, he asked to speak with his attorney. Officer Gauntlett testified that Cammarano merely said that Sheaffer was his attorney and asked whether he had the right to have Sheaffer present. Gauntlett responded that Cammarano had the right to have his attorney present, but Cammarano never asked that Sheaffer be present before he made further statements. After Cammarano made his reference to Sheaffer, Gauntlett left the room. When he returned, Gauntlett asked Cammarano if he wished to make a statement. Cammarano said that he did. Based on this

testimony, the trial court denied the motion to suppress without making any factual findings.

"Only unequivocal requests for counsel require officers to cease questioning a suspect." *Craig v. Singletary*, 127 F. 3d 1030, 1039 (11th Cir. 1997); *accord State v. Owen*, 696 So.2d 715 (Fla. 1997); *Davis v. United States*, 512 U.S. 452, 462 (1994)("Maybe I should speak to an attorney" was not an unequivocal request for counsel that required law enforcement agents to cease questioning the defendant). Because the trial court did not make factual findings in support of its denial of the motion to suppress Cammarano's statements, it is difficult to determine whether the Court made a credibility judgment between Gauntlett's testimony that Cammarano made an equivocal request for counsel and Cammarano's testimony that he made an unequivocal request for counsel. If Cammarano's testimony is credited, then questioning of him could only resume if Cammarano initiated further conversation. *Edwards*, 451 U.S. at 484. The record does not support a finding that Cammarano initiated the conversation after he made his request for counsel.

The Court does not have to reach this credibility issue because admission of Cammarano's statements would be, at most, harmless error. The Supreme Court's standard for assessing harmless error at trial is whether the improperly admitted evidence had a "substantial and injurious effect or influence in determining the ... verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Correll v. Thompson*, 63 F. 3d 1279, 1291 (4th Cir. 1995)(applying harmless error analysis to *Edwards* violation). If, after reviewing the trial transcripts de novo, "the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error," the Court should resolve the doubt in favor of the petitioner.

I do not find that admission of Cammarano's statements made after he asked for or about counsel had a substantial and injurious effect or influence in determining

the verdict. Potenzo, an eyewitness, testified about Cammarano's participation and involvement in the robbery which resulted in Potenzo killing Romano and Nuss. Other witnesses placed Cammarano at the scene of the crime. Immediately following the crime, Cammarano was found by law enforcement walking away from the Southern Nights lounge carrying a bag of money stolen from the lounge, accompanied by Potenzo who was carrying the murder weapon. Cammarano does not contend that his first false statement to the police, made at the time of his arrest, was taken in violation of *Edwards v. Arizona*. Therefore, this initial false statement would have been admitted, even if the other statements had been excluded. The remaining statements, even if taken in violation of *Edwards v. Arizona,* were also admissible to impeach Cammarano. *Harris v. New York*, 401 U.S. 222 (1971). Considering the weight of this evidence, I concluded that admission of Cammarano's statement made after he referred to or requested to speak with his attorney was harmless.

D. Admission of Evidence is a Question of State Law That Is Not Reviewable By This Court Because Cammarano Failed to Raise the Constitutional Issues of Equal Protection and Due Process Under the Fourteenth Amendment in the Sate Proceedings.

Cammarano claims that he was denied equal protection of the laws and due process of law in violation of the Fourteenth Amendment because Potenzo's affidavit was not admitted during the hearing before the Circuit Court following remand by the Fifth District Court of Appeals of Cammarano's second 3.850 motion. (App., Tab P). This federal claim was first articulated in the habeas petition now before the court.

In order for the states to be given the opportunity to correct alleged violations of prisoners' federal rights, "they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Cammarano did not assert these federal rights at any time in the state proceedings. Thus, he failed to give the state the opportunity to correct these alleged violations.

Additionally, "a state's interpretation of its own laws provides no basis for federal habeas relief since no question of a constitutional nature is involved." *Beverly v. Jones*, 854 F. 2d 412, 416 (11th Cir. 1988). "This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is 'couched in terms of equal protection and due process.'" *Branan v. Booth*, 861 F. 2d 1507, 1508 (11th Cir. 1988)(quoting *Willeford v. Estelle*, 538 F. 2d 1194, 1196-98 (5th Cir. 1976)). To the extent that Cammarano is asking the federal court to reexamine state court determinations on questions of state law, the federal court should defer to the state court. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). A state court's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved. *Carrizales v. Wainwright*, 699 F. 2d 1053, 1055 (11th Cir. 1983).

In the instant case, the underlying matters for which Cammarano seeks relief are within Florida's state law, namely, the Florida evidence rules. Federal habeas relief is not available for "[q]uestions of pure state law." *Carrizales*, 699 F. 2d at 1054.

III. CONCLUSION.

For the foregoing reasons, the Petition for Writ of Habeas Corpus By a Person in State Custody (Docket No. 27) is **DENIED**.

DONE and ORDERED in Orlando, Florida on this 2nd day of September, 1998.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 98-3357-HH

JOSEPH CAMMARANO,

Petitioner - Appellant,

v.

MICHAEL W. MOORE, et al.,

Respondents - Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

OPENING BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Cammarano v. Singletary

Court of Appeals Docket Number 98-3357

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Hon. Gary L. Formet, Sr.
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/s/ Paul Morris
PAUL MORRIS

STATEMENT REGARDING ORAL ARGUMENT

The appellant respectfully requests oral argument on the basis that it will aid in the decisional process.

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in the brief is 10 point Courier.

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STATEMENT OF JURISDICTION

This jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I.

WHETHER THE DISTRICT COURT ERRED IN RULING THAT CAMMARANO FAILED TO PRESENT TO THE STATE COURTS HIS FEDERAL CLAIM THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL LABORED UNDER A CONFLICT OF INTEREST.

II.

WHETHER THE DISTRICT COURT ERRED IN RULING THAT CAMMARANO WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE COUNSEL FAILED TO INTERVIEW AND PRESENT WITNESSES WHO WOULD HAVE TESTIFIED THAT THE PROSECUTION'S STAR WITNESS CONFESSED TO THEM THAT HE WAS FALSELY IMPLICATING CAMMARANO.

III.

WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE STATE COURT'S FAILURE TO SUPPRESS CAMMARANO'S STATEMENTS, EVEN IF VIOLATIVE OF *MIRANDA* AND ITS PROGENY, CONSTITUTED HARMLESS ERROR.

IV.

WHETHER THE DISTRICT COURT ERRED IN RULING THAT CAMMARANO'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHERE, AT A POST-CONVICTION PROCEEDING, THE STATE COURT EXCLUDED EVIDENCE THAT THE PROSECUTION'S STAR WITNESS CONFESSED THAT HIS TESTIMONY IMPLICATING CAMMARANO WAS PERJURIOUS.

STATEMENT OF THE CASE

Course of Proceedings and Dispositions in the Court Below

The petitioner/appellant, Joseph Cammarano, was charged by the State of Florida, along with Dennis Potenzo, with two counts of murder in the first degree and one count of armed robbery. (App.A-2333-2334). Following a trial by jury, Cammarano was found guilty as charged and sentenced on the murder charges to two concurrent life sentences with no possibility of parole for twenty-five years. Sentence was withheld as to the armed robbery. (App.A-1560-1561; 2004-2005; 2523-2525). After exhausting state remedies, Cammarano filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida which was removed to the Middle District of Florida and refiled. (R1-1-14, 27-28).

On September 2, 1998, Cammarano's amended petition for writ of habeas corpus was denied without an evidentiary hearing by United States District Judge Anne C. Conway who also denied a certificate of probable cause. (R2-60). A timely notice of appeal was filed with this Court (R2-62) which granted a certificate of probable cause. Cammarano is incarcerated.

Statement of the Facts - Introduction

Cammarano was arrested on May 24, 1984. (App.A 1571, 1591). On July 10, 1984, an indictment was returned charging Cammarano and Dennis Potenzo with two counts of first degree murder and one count of armed robbery. (App.A 2333-34, App.G 425-26). Cammarano was represented pretrial, at trial and on direct appeal by William J. Sheaffer. The trial judge was the Honorable R. James Stroker.

Potenzo shot and killed two employees of a bar and stole the bar's receipts. The prosecution relied upon the testimony of Potenzo to support its theory that Cammarano was guilty of felony murder. According to Potenzo, Cammarano knew about and assisted in Potenzo's robbery. The only other evidence offered by the prosecution to prove Cammarano's guilty knowledge consisted of statements he made after his arrest. Cammarano unsuccessfully sought suppression of the statements for violation of *Miranda*[1] and its progeny. Cammarano testified on his own behalf and presented witnesses to support the defense that he was employed to do plumbing work at the bar, that on the day in question Potenzo accompanied him to the bar to help with the work, and that Potenzo committed the robbery and murders without Cammarano's knowledge.

Motion to Suppress Statements

Prior to trial, Cammarano sought suppression of his statements on the ground that they were obtained after and despite his request for counsel in violation of *Miranda* and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). An evidentiary hearing was held on the motion to suppress. (App.A 1567-1800, 1899-1912).

Orlando Police Officer Richard Albert testified at the hearing that at approximately 10:50 a.m. on May 24, 1984, he observed two men later identified as Cammarano and Potenzo walking near the Southern Nights [the bar] in Orlando. (App.A 1577-78). Albert stopped them because he was wondering what they were doing in what he described as a high crime area for residential and commercial burglaries. Albert observed Potenzo walk to the curb, drop a towel in front of the patrol car and return to Cammarano's side. Cammarano was carrying a bag which he eventually placed on the ground. (App.A 1578-80; 1585-86; 1599).

Upon questioning by Albert, Cammarano indicated that he was doing plumbing work at the bar and that they

were walking to Cammarano's car which was running out of gas. (App.A 1013; 1582-83). Albert observed something metallic in Cammarano's waistband and radioed for backup. Albert looked into the bag and observed currency. At the same time, Potenzo ran away. (App.A 1581-85). Albert drew his weapon on Cammarano, handcuffed him and placed him in the patrol car. (App.A 1586). Albert picked up the towel that Potenzo dropped and observed a gun. (App.A 1587). The metallic object in Cammarano's waistband was a small plumbing tool. (App.A 1588). Potenzo was later apprehended. (App.A 667).

Detective Jeffrey Gauntlett testified that he arrived on the scene. (App.A 1637). Gauntlett searched Cammarano's bag and found, among other things, cash and bank bags. (App.A 1638). Gauntlett went over to Cammarano in the patrol car. (App.A 1639). Cammarano orally waived his rights. (App.A 1640; 1651). Gauntlett asked about the money. Cammarano responded that the money came from the bar. Gauntlett sent an officer to the bar who found two employees who were shot to death. (App.A 1640-41).

Gauntlett testified that Cammarano said he was working at the bar when he heard two shots. The gunman, whom Cammarano denied knowing at that time, forced Cammarano outside to the area where Albert stopped them at which time the gunman ran away. (App.A 1640-41). (When Cammarano was first advised that two people at the bar were shot to death, Gauntlett testified at the trial that Cammarano appeared "shocked". (App.A 997)).

Gauntlett testified that Cammarano was taken to the police station where he was re-advised of his rights by Gauntlett. Cammarano signed a rights card, stated that his attorney's name was Sheaffer, and asked if Sheaffer could be present. Gauntlett responded in the affirmative and left the interrogation room. (App.A 1654-57). Outside the room, Gauntlett approached Investigator Mundy. Mundy testified that Gauntlett told him that Cammarano "wished an attorney." (App.A 1684). Mundy asked Gauntlett whether

Cammarano wanted to talk. When Gauntlett told Mundy that he did, Gauntlett and Mundy returned to the interrogation room. Gauntlett did not tell Cammarano that any attempt would be made to contact Sheaffer and Gauntlett made no such effort. Nor was Cammarano allowed to contact Sheaffer. Instead, Gauntlett and Mundy asked whether Cammarano would give them a statement. Cammarano responded that he would and an interrogation ensued resulting in an oral statement which was followed by a tape recorded statement.

Another statement was taken by Sergeant Rakes during a polygraph examination. (App. A 1642; 1654-1659; 1678; 1680). Subsequently, Mundy and Gauntlett took yet another statement. (App.A 1659-60). The officers obtained the statements from Cammarano over a period of approximately eight hours. (App.A 1661).

Cammarano testified at the suppression hearing. He stated that when he was brought to the police station for questioning, he was advised of his rights. He named his attorney, Sheaffer, and asked Gauntlett for permission to speak to him. (App.A 1901-02). Gauntlett simply left the room and later returned with Mundy. (App.A 1902). Cammarano asked for a telephone to call Sheaffer. Gauntlett and Mundy left the room for approximately thirty minutes. Gauntlett returned and read Cammarano his rights. Cammarano again asked to place a telephone call but was instead questioned resulting in the statements Cammarano sought to suppress. (App.A 1903-04). The state trial judge denied the motion to suppress the statements without making any findings of fact. (App.A 2447).

The Prosecutor's Investigation of Sheaffer and Motion to Disqualify Sheaffer

The case against Cammarano was prosecuted by Assistant State Attorney William Sharpe. Sharpe's list of trial witnesses included an inmate in a Florida prison, Daniel

Sydow. Prior to the trial, Sheaffer interviewed Sydow at the prison. Afterwards, Sydow told Sharpe that Sheaffer offered him a bribe in exchange for favorable testimony. Based upon Sydow's accusation, Sharpe launched an investigation and filed a motion to disqualify Sheaffer as trial counsel on the ground that he was a potential witness. (App.A 234-235).

A pretrial hearing on the motion to disqualify counsel was held before the trial judge on March 26, 1985. At the hearing, the prosecutor argued that even though he no longer intended to call Sheaffer as a witness, Sheaffer should still be removed as Cammarano's counsel. The trial court denied the motion to disqualify on the basis that the prosecution was not going to call Sheaffer as a witness. However, at no time during the hearing (or any time thereafter) was Cammarano advised by the judge or anyone else that the State Attorney's investigation of his counsel for bribery of a witness and/or suborning perjury raised an issue of ineffective assistance of counsel due to conflict of interest. Nor did Cammarano ever waive his right to conflict-free counsel. (App.A-2274-2308).

Sheaffer obtained counsel who filed a motion to appoint a special prosecutor. (App.A 2506-10). The motion noted that after the hearing on the prosecutor's motion to disqualify, Sheaffer was advised that a local grand jury would hear the allegations against him. (App.A-2509).

Approximately ten days before the motion for disqualification of Sheaffer was filed, Hinton Waters, a Florida prison inmate, wrote a letter to Chaplain Dan Matsche of the Orange County Jail. In the letter, Waters related that he was told by Potenzo that Cammarano knew nothing of Potenzo's plan to rob the bar and did not know about the murders until after his arrest. Waters further advised Chaplain Matsche that Potenzo told him that he would do whatever was necessary to save himself from the electric chair. Potenzo also stated that Cammarano deserved whatever happened to him, blaming Cammarano's inaction when the two were approached by police as the reason for Potenzo's arrest. (App.G 443-445; 448-450).

Not long after he received the letter from Waters, Chaplain Matsche saw Sheaffer and showed him the letter. Sheaffer took the letter but appeared to the Chaplain to be disinterested. (App.G 161-162; 451-452). Waters was never contacted by Sheaffer concerning the contents of the letter and Sheaffer did not call Waters as a witness at trial. (App.G 450).

The Trial

At the trial, it was established that the bar hired Cammarano to do plumbing work. (App.A 558). On May 21, 1984, the Monday of the week of the shooting, Potenzo accompanied Cammarano to assist him in plumbing work at the bar. The bar gave money to Cammarano to purchase plumbing supplies. (App.A 877-79). The week of the shooting, Cammarano was scheduled to return to the bar to finish plumbing repairs. (App.A 577-80, 872-73; 878-79). A bar employee testified for the state that he searched all the receipts for plumbing supplies and at first could only find receipts dated May 10, 1984. (App.A 884-86).

The prosecution's key witness at the trial was Potenzo. Potenzo entered a plea of guilty to two counts of murder in the first degree. Although Potenzo admitted to having killed the two victims in an execution style murder, the prosecution waived the death penalty resulting in two concurrent life sentences in return for Potenzo's testimony implicating Cammarano. (App.A 623). Potenzo testified that he pled guilty to both murders in exchange for the life sentences, a recommendation that he not be sent to Florida's three most dangerous prisons, and testifying against Cammarano. (App.A 624-26).

Potenzo came to Florida from New York two months before the murders and moved into Cammarano's apartment. (App.A 627). Potenzo claimed that he and Cammarano agreed to rob the bar and that Potenzo would kill any witnesses to prevent identification. (App.A 633-37). They

entered the bar and employees were there. Potenzo had a criminal record, was a fugitive from New York, and a cocaine addict. Potenzo claimed he was acting at the direction of Cammarano (who was only 19 and without any criminal record). Potenzo testified that he and Cammarano planned to flee to Fort Lauderdale after the robbery. Potenzo further claimed that to avoid suspicion during their absence, Cammarano changed the message on his telephone answering machine to announce that Cammarano went to Fort Lauderdale and would be away for several days. (App.A 717-19).

However, the testimony of prosecution witness Julie Kerce contradicted Potenzo. Kerce testified that on the evening of Wednesday, May 23, 1984, she saw Cammarano at the bar at approximately 10:00 p.m. The two planned to spend the next day together. But Kerce had to work so they agreed to meet for dinner. When Cammarano failed to appear (because of the arrest), she called his telephone number four times. Contrary to Potenzo's testimony that Cammarano changed the message on the answering machine, Kerce testified that each time she called, the recording simply asked the caller to leave a message. (App.A 930-36).

Kerce also testified that two weeks prior to the shooting, Potenzo asked her where the safe was located in the bar's office and how many people were in and out of the office during the day. (App.A 938). Kerce also recalled that Cammarano once showed her his gun which he kept hidden. Cammarano stated that he was hiding the gun from Potenzo. (App.A 939).

State witness Tammy Brown testified that the evening before the shootings, Potenzo was alone at the bar. (App.A 945). Brown also testified that she was in a car alone with Potenzo when he showed her a gun which he stated he took without Cammarano's permission. (App.A 946-47).

Detective Gauntlett recounted Cammarano's initial oral statement made in the police car. Gauntlett testified that later at the police station, Cammarano made a second oral

statement. In that statement, Cammarano said that he went to the bar that morning with Potenzo to do plumbing work. Their car ran out of gasoline so they parked. They walked to the bar and Cammarano carried a bag with tools. The front door was open. Cammarano went to check on the toilet and lost sight of Potenzo. Cammarano then went to an area of the showroom bar and heard a noise like a muffled gunshot or hammer hitting something. Then he heard another. Cammarano then walked toward the office and Potenzo emerged stating that they had to get out of there. Cammarano did not know what was happening but he was afraid and ran for the door. Potenzo had the bag. Cammarano did not see a gun. They ran around the corner and Potenzo threw the bag at Cammarano. Seconds later, they were stopped by Officer Albert and Potenzo fled. (App.A 976-80). Cammarano said that the gun seized belonged to him and he had last seen the gun in his apartment. (App.A 980-81). After that interview, Gauntlett took a tape recorded statement from Cammarano which was played for the jury. (App.A 981-83; State Exhibit 52).[2]

After this taped interview, Cammarano was interviewed by Investigator Mundy and Sergeant Rakes (in connection with polygraph examinations). (App.A 983). Mundy testified that Cammarano stated that he knew that Potenzo wanted to commit a robbery. (App.A 1013). After those interviews, another taped statement was taken by Gauntlett and Mundy which was played for the jury. (App.A 983.; State's Exhibit 53).[3] Cammarano consented to a search of his apartment. No evidence connected with the homicides was found there. (App.A 827; 838).

Cammarano testified on his own behalf. The direct examination by Sheaffer comprises 36 pages of the trial transcript. (App.A 1186-1222). Sheaffer asked but one question of Cammarano with regard to what happened at the bar, namely, whether his statement made at the Office of the State Attorney was a true account of what took place.[4] (App.A 1207). No other details of the crime were adduced

by Sheaffer. Instead, Cammarano was closely questioned on cross-examination by the prosecutor about the events with emphasis upon the differences among all of Cammarano's statements. That cross examination comprises 82 pages of the trial transcript. (App.A 1226-1308). Sheaffer's redirect examination encompasses three pages. (App.A 1308-10).

An employee of a plumbing supply company testified that supplies, including a toilet and parts for its installation, were purchased on May 21, 1984 for the bar, as Cammarano claimed. The receipts were admitted into evidence. (App.A 1413-21). Employees of the bar confirmed the purchase and added that the documentary proof of the purchase was not sought until the night before they testified. (App.A 1426-27; 1432).

Throughout his closing argument to the jurors, the prosecutor relied upon Cammarano's statements. (App.A 1447-49; 1458, 1462, 1464-67). The sole issue in the case, according to the prosecutor, was whether Cammarano knew that a robbery of the bar would take place. The prosecutor told the jurors that if Cammarano had such knowledge, the verdict should be guilty of felony murder. But if Cammarano did not know a robbery was going to take place, the jurors should vote not guilty. (App.A 1452).

According to the prosecutor, the statements proved Cammarano's guilt due to their admissions and contradictions. (App.A 1466-67, 1469). The prosecutor also contrasted Cammarano's statement to Officer Albert on the scene with Cammarano's taped statements (App.A 1458) and with Albert's testimony. (App.A 1464-65). The prosecutor dismissed the testimony of defense witness Michael Caripy as that of a four-time convicted felon who could not be believed. (App.A 1467-68).[5]

In his closing argument, the prosecutor urged the jurors to return a guilty verdict against Cammarano because he was represented by privately retained counsel whereas Potenzo had appointed counsel.[6] Sheaffer did not object to

the prosecutor's argument. (App.A 1470). Cammarano was found guilty as charged. (App.A 1560-61).

The Direct Appeal

On direct appeal to the District Court of Appeal of Florida, Fifth District, Sheaffer raised as error, *inter alia*, the trial judge's denial of the motion to suppress Cammarano's statements in violation of *Edwards v. Arizona*. (App.B at i-ii). The appellate court affirmed without an opinion. *Cammarano v. State*, 494 So. 2d 219 (Fla.5th DCA 1986). (App.E, F).

The First Post-Conviction Motion and Hearing

On May 20, 1987, Cammarano filed a motion to vacate his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850 [first 3.850 motion]. The first 3.850 motion was based in pertinent part upon the denial of Cammarano's sixth amendment right to effective assistance of counsel. (App.G 427-457). The first 3.850 motion alleged, *inter alia*, that the prosecutor's investigation of Sheaffer for witness bribery impaired Sheaffer's ability to afford effective assistance of counsel. In part, the 3.850 motion raised that issue as follows:

> During the course of the trial in this matter, many unusual and irregular events occurred which may have impaired trial counsel's ability to perform effectively. State Attorney Sharpe initiated a proceeding to determine whether William Sheaffer and his investigator had offered a witness money in return for favorable testimony. Certainly, the attempt by the Assistant State Attorney to have Mr. Sheaffer removed as trial counsel on allegations of misconduct, created an

> atmosphere in which anyone would have difficulty performing.

(App.G 441).

The first 3.850 motion alleged many instances of Sheaffer's ineffectiveness. Attached to the motion was the affidavit of Dan Matsche, the Chaplain of the Orange County Jail in Orlando, Florida (App.G 451-52), a copy of a handwritten letter to Matsche from Hinton Waters dated March 12, 1985 (App.G 443-45), and an affidavit of Waters (App.G 448-50). In his affidavit, Matsche stated that he received the letter from Waters prior to Cammarano's trial. At the time, Waters was sharing a cell with Potenzo. The letter related that Potenzo told Waters that Cammarano had nothing to do with the murders and knew nothing about them. Matsche immediately spoke with Waters who confirmed the letter's accuracy. Matsche brought the letter to Sheaffer who did not seem interested and gave no indication that he wanted to know anything about Matsche's conversation with Waters. Matsche subsequently learned that there was no follow-up investigation by Sheaffer and that the information was not used. (App.G 451-52). In his affidavit, Waters corroborated Matsche and related Potenzo's confession. (App.G 448-450).

Cammarano also executed an affidavit which was attached to the first 3.850 motion. Cammarano stated that Sheaffer neither discussed Waters' letter with him nor indicated during the course of trial preparation that the letter existed. (App.G 456-57). The 3.850 motion listed numerous other examples of Sheaffer's inadequate performance. (App.G 441-442).

On September 17-18, 1997, an evidentiary hearing was held on the first 3.850 motion before the Honorable Gary E. Formet, Sr. Cammarano's father testified that Sheaffer agreed to communicate with him on every important matter in the case. (App.G 75). Not until after the trial did Sheaffer inform the father of the letter from Hinton

Waters to Chaplain Matsche. (App.G 78-9). Cammarano testified consistently with his affidavit. (App.G 99-125). Hinton Waters testified that he met Potenzo at the Orange County Jail. On March 22, 1985, he wrote his letter to Chaplain Matsche and thereafter spoke to the Chaplain. Sheaffer never contacted Waters. (App.G 130-334). Waters would have testified at Cammarano's trial if asked. Waters did not know Cammarano. (App.G 135-36). Waters reiterated that Potenzo "flat out, no if's, and's or but's about it" said several times that Cammarano was without any advance knowledge of Potenzo's plan to commit a robbery. (App.G 155). Waters added that he once told Potenzo that Clyde Barrow once said that the most important part of a bank robbery plan was the getaway and Waters could not figure out why Cammarano did not know what to do. Potenzo responded that Cammarano was not told about Potenzo's plan to rob the bar because "he would have blown the whole thing." (App.G 154-55). Chaplain Matsche's testimony confirmed that which he stated in his affidavit. (App.G 158-64).

Prosecutor Sharpe testified for the state at the hearing. Sharpe conducted an investigation of Sheaffer after learning of bribery allegations against Sheaffer. Sharpe's office interviewed several witnesses with whom Sheaffer had contact. (App.G 59-60). Sharpe concluded that "Mr. Sheaffer could not represent Mr. Cammarano..." and therefore moved to disqualify Sheaffer. (App.G 55). Sharpe believed that evidence could have been adduced at Cammarano's trial which would have forced Sheaffer to defend himself. (App.G 55). Sharpe could not dispute that there was media coverage given to the allegations against Sheaffer. (App.G 57-58). Sharpe acknowledged that at least a month prior to the trial and during the trial that Sheaffer was under a cloud of suspicion. (App.G 58). Sharpe opined that he would not have wanted to be in Sheaffer's position. (App.G 58).

Sheaffer was called as a witness by the prosecution. In an effort to show that he conducted a proper pretrial

investigation into the background of Waters and that the decision not to call Waters was reasonable trial strategy, Sheaffer testified that he met with Chaplain Matsche, considered Waters' letter, and decided that some of it was inaccurate. Sheaffer never interviewed Waters. Sheaffer stated that he interviewed several attorneys who previously represented Waters. Sheaffer claimed that these attorneys told him that Waters was a liar and on a mission due to his own unjust conviction. (App.G 202-213; 258). Sheaffer also claimed that he told Cammarano about Waters' letter. (App.G 271). Sheaffer refused to divulge the names of the attorneys he claimed he consulted about Waters. When the trial judge ordered Sheaffer to provide the names of the attorneys, Sheaffer testified that he could not remember their names. The trial judge took a recess and instructed Sheaffer to review his notes and attempt to recall the attorneys' names. Following the recess, Sheaffer named William Kinane and John Meehan as the attorneys. (App.G 259-266).

Sheaffer testified that at Cammarano's trial he presented the testimony of Caripy who stated that Potenzo recanted. According to Sheaffer, Caripy's testimony, unlike Waters' letter, matched the evidence and Cammarano's account. (*Id.* at 209). Sheaffer acknowledged that in addition to Waters and Caripy, there were at least two other witnesses, also not called by Sheaffer, who were told by Potenzo that Cammarano was innocent but whom Sheaffer did not call to testify on behalf of Cammarano. (*Id.* at 202).

Sheaffer testified: "I was concerned about the effect of the investigation on two fronts, one my immediate representation of Joe Cammarano, and two, my future career as a criminal defense attorney in Orange County." "You might as well take my license if you take my reputation." (*Id.* at 256).

Sheaffer also explained his decision to subject Cammarano to hypnosis.[7] Sheaffer thought hypnotically refreshed out-of-courts statements were admissible. But if the statements were excluded (which they were), Sheaffer's

intended to file the statements with the clerk of the court in the hope that a juror's family would see the statements in the press and that the juror would "swing everybody else" or at least "hold out" for a not guilty verdict. (*Id.* at 243).

The trial judge entered an oral ruling denying the first 3.850 motion. Essentially, the trial judge found that Cammarano failed to prove prejudice. (*Id.* at 340-46).

The Rehearing on the First Post-Conviction Motion

Meehan and Kinane were thereafter contacted and denied Sheaffer's testimony. Based thereon, a motion for rehearing was filed. An evidentiary hearing was held on July 15, 1988. (App.G 352-55; 461-475).

Meehan testified that Sheaffer never had a conversation with him about Waters. Moreover, had he been asked, Meehan would have said that Waters was a person of veracity who would have made a truthful witness. (App.G 391).

Kinane testified that he had no specific recollection of a conversation with Sheaffer about Waters but that it was possible there had been a fleeting conversation while Kinane was "on the run". (App.G 362). But if he had been asked about Waters, Kinane testified that he would not have said that Waters was an unbelievable or unreliable witness. (App.G 362-63; 381). To the contrary, Kinane testified that Waters was articulate and credible. (App.G 382-383).

Sheaffer testified again and insisted not only did he consult Kinane, but also that Kinane counseled against using Waters as a witness, despite Kinane's contrary testimony. (App.G 393, 397). Additionally, and for the first time, Sheaffer now claimed that he consulted another attorney other than Meehan. When pressed for details, Sheaffer said he did not recall the name of the attorney, did not know whether the person was a man or a woman, did not recall if the second attorney had ever represented Waters, and did not

remember if the other attorney practiced law in Orlando. (App.G 394, 396, 399).

On July 22, 1988, the state judge entered a two-page order denying Cammarano's 3.850 motion and motion for rehearing. (App.G 478-480). In essence, the judge found that Cammarano suffered no prejudice. *Id.*

Cammarano appealed to the Fifth District Court of Appeal. Cammarano presented to the appeals court the argument that the prosecutor's criminal investigation of Sheaffer "undoubtedly affected [Sheaffer's] ability to function effectively during the course of preparing [Cammarano's] case." (App.H 20). The appellate court affirmed without opinion. *Cammarano v. State*, 548 So. 2d 671 (Fla.5th DCA 1989). (App.K). The Supreme Court of Florida dismissed review. *Cammarano v. State*, 551 So. 2d 460 (Fla.1989).

The Second Post-Conviction Motion and Hearing

On August 14, 1991, Cammarano filed a second 3.850 motion. (App.L). Attached to the motion was an affidavit executed by Potenzo. In the affidavit, Potenzo recanted his trial testimony and stated that he would testify that he carried out the crimes without any assistance or knowledge on Cammarano's part. (App.P 146-164). The affidavit further indicated that Potenzo lied at Cammarano's trial because he was angry with Cammarano and sought to avoid a sentence of death for the two homicides Potenzo committed. (App.P 163-164). The second 3.850 motion was summarily denied on the ground that Potenzo's recantation could have been discovered upon the exercise of due diligence. (App.M). On appeal by Cammarano, the summary denial was reversed and remanded. *Cammarano v. State*, 602 So. 2d 1369 (Fla.5th DCA 1992). Upon remand, a hearing was held on the second 3.850 motion on December 11, 1992 before the Honorable John H. Adams, Sr.

Although he did not retreat from his affidavit that his testimony at Cammarano's trial was perjury, Potenzo did, by way of another affidavit, state that if called as a witness to testify at the second 3.850 hearing, he would invoke his privilege against self-incrimination. That affidavit was introduced into evidence at the hearing. (App.P 34, 124).

Cammarano's father testified that in 1987, in preparation for the first 3.850 proceeding, Potenzo was contacted about recanting the false testimony he gave at Cammarano's trial. Potenzo declined stating that he was worried about jeopardizing his own situation. (App.P 14-15; 16-17).

Several months later, Potenzo telephoned Cammarano's father. Potenzo said he was sorry for what he did but that he felt his life was at stake. He believed that he could not change his testimony without risking his plea bargain or facing a perjury charge. The father pled with Potenzo to come forward and tell the truth. Potenzo said he could not and was too worried about his own situation. (App.P 16-20).

On April 18, 1991, Steven Votra, a licensed private investigator and notary, interviewed and wrote out what Potenzo told him which Potenzo executed under oath as an affidavit. The judge denied admission of this affidavit into evidence. (App.P 17-32; Exhibit B).

On July 11, 1991, Votra visited Potenzo again and presented Potenzo with a typewritten affidavit prepared from the handwritten one. They reviewed the affidavit for accuracy and Potenzo executed it under oath. The judge denied admission of this affidavit into evidence. (App.P 37-40). This affidavit was attached to the second 3.850 motion. (App.P 163-64). In the affidavit, Potenzo stated the following: the idea to rob the bar and commit the murders was solely his; the crimes were committed without Cammarano's knowledge; Cammarano did not participate in the robbery or murders; and he testified falsely against Cammarano. (*Id.*)

Cammarano attempted to call Waters as a witness. The prosecution objected and the trial court sustained the objection. Waters testified as a proffer as follows. Waters runs the Worldwide Prison Ministries out of Oxford, Georgia. The organization works with defendants after they have been released to prevent recidivism. Waters, now a minister, was himself released from incarceration in 1989 after serving five years. Waters testified that he met Potenzo in jail. Potenzo started talking about the bar murders. Eventually, Potenzo gave one consistent version of the murders. Potenzo stated that he took Cammarano's gun to the bar without Cammarano's knowledge. While Cammarano was in another part of the bar, he shot both victims and took the bar's money. He went to Cammarano and told him what he did. Cammarano did not believe him until he saw the victims. Potenzo urged Cammarano out of the bar. (App.P 50-61). Potenzo said that Cammarano was just a kid who did not know what Potenzo was going to do. Potenzo said he would pay the price for the crimes and Cammarano would go free. (App.P 62). Months later, Waters and Potenzo were in another institution. Potenzo stated that he was going to testify against Cammarano. (App.P 65). Waters confronted Potenzo. Potenzo broke down and cried and said that he was going to die in the electric chair. (App.P 66-67). Waters said that would not happen because Potenzo had already been sentenced. But Potenzo was terrified. At this point, Waters wrote his letter to Chaplain Matsche. (App.P 67). Waters was not contacted by anyone prior to Cammarano's trial. (App.P 68).

The judge also excluded the testimony of Leonard Mazzara. Mazzara's testimonial proffer was as follows. Mazzara is an inmate serving life sentences. He met Potenzo at a prison in Avon Park, Florida in 1988. Potenzo told Mazzara that he used Cammarano to gain access to the bar. Potenzo said he shot the manager in the bar office while Cammarano was in a bathroom. When Cammarano left the bathroom, Potenzo entered the bathroom where he shot the

other victim. Potenzo said that Cammarano had "no knowledge whatsoever." When Mazzara later met Cammarano, he told him what Potenzo said. Mazzara executed an affidavit in 1990 which the trial court excluded from evidence. (App.P. 97-102; Exhibit E).

At the close of the hearing, the prosecution moved for summary denial of the second 3.850 motion. The judge orally granted the motion. (App.P 130-32). On December 16, 1992, the trial court entered a written order denying the second 3.850 motion without reasons. (App.P 180-81).

On appeal, Cammarano argued that he established due diligence and that the trial court erred in refusing to admit into evidence the affidavits of Potenzo as statements against penal interest, citing *Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that a mechanistic application of the hearsay rule which prevents the introduction into evidence of statements against penal interest violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America) and *Baker v. State*, 336 So. 2d 364 (Fla. 1976), the leading case in Florida adopting *Chamber* as the law of the State of Florida. (App.Q 17). The appellate court affirmed without an opinion. *Cammarano v. State*, 632 So. 2d 1044 (Fla.5th DCA 1994). (App.T).

The Petition for Writ of Habeas Corpus

Cammarano filed his petition for writ of habeas corpus with the United States District Court for the Middle District of Florida. (R1-1-27). The petition raised the following grounds pertinent to this appeal: Cammarano was denied his sixth amendment right to conflict-free counsel when, prior to and during his trial, his counsel was the subject of a criminal investigation by the same prosecutor; Cammarano was denied his sixth amendment right to effective assistance of counsel when he failed to investigate or present critical witnesses; the denial of his motion to

suppress statements violated *Edwards v. Arizona*; and the exclusion of Potenzo's affidavits at the second 3.850 motion hearing violated *Chambers*. The district judge denied the petition without an evidentiary hearing by written order entered September 2, 1998. (R2-60).

Cammarano timely appealed. (R2-62). Cammarano's appellate counsel filed with the district court a motion to supplement the record with the tape recordings of his statements which were admitted into evidence at Cammarano's trial. The district judge denied the motion on the ground that the tapes were not before the court at the time judgment was entered.

STATEMENT OF THE STANDARDS OF REVIEW

The constitutional question of the admissibility of a confession is a mixed question of law and fact subject to plenary federal review. *Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Questions involving ineffective assistance of counsel and conflicts of interest are mixed determinations of law and fact subject to plenary federal review and are not entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.1999) (en banc). The question whether a state prisoner in a federal habeas proceeding has exhausted state remedies is a mixed question of law and fact subject to de novo review. *Fox v. Kelso*, 911 F.2d 563, 568 (11th Cir.1990). The standard of review for state evidentiary ruling in federal habeas corpus proceedings is whether the ruling infused the proceeding with such unfairness as to deny due process of law. *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941); *Felker v. Turpin*, 83 F.3d 1303 (11th Cir.1996).

SUMMARY OF THE ARGUMENTS

I.

Prior to, during, and after Cammarano's trial, his counsel was under investigation by the prosecutor for crimes arising out of the case. Counsel was accused of offering a bribe to a state witness in exchange for testimony favorable to Cammarano. The resulting conflict of interest denied Cammarano his sixth amendment right to effective assistance of counsel. The district court found that the issue had not been exhausted in the state courts. The district court erred. The record reveals that Cammarano fairly presented the issue to the state courts.

II.

Cammarano's trial counsel was also ineffective for not having interviewed or presented witnesses at the trial who would have testified that Potenzo admitted he was falsely implicating Cammarano.

III.

Following his arrest, Cammarano was taken to an interrogation room at a police station. When advised of his *Miranda* rights, Cammarano told the interrogating officer the name of his attorney and asked whether that attorney could be present. The officer said "yes", left the room, and told another officer that Cammarano desired counsel. The officers continued to interrogate Cammarano rather than honor his request for counsel. In the state courts, Cammarano unsuccessfully challenged the admissibility of the statements under *Miranda* and its progeny.

The district court, without an evidentiary hearing, ruled that the admission of the challenged statements constituted harmless error. The district court erred. The

admission of the challenged statements was highly prejudicial to Cammarano. The undisputed evidence established that the two murders at issue were committed by Dennis Potenzo, who testified against Cammarano to avoid the death penalty. Potenzo's credibility was challenged and after the trial he recanted his testimony. Cammarano testified that he had no knowledge that Potenzo intended either to commit the murders or rob the bar where the murders were committed. The prosecution's theory against Cammarano was that he was guilty of felony murder because he knew Potenzo was going to rob the bar. The only evidence of Cammarano's guilty knowledge, other than Potenzo's testimony, came from the challenged statements. Thus, the harmless error doctrine could not apply. At the very least, Cammarano should have been afforded an evidentiary hearing.

IV.

Cammarano was denied due process of law when, in a post-conviction proceeding, the state judge excluded evidence that Potenzo admitted under oath in affidavits and to others that he committed perjury when he implicated Cammarano.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN RULING THAT CAMMARANO FAILED TO PRESENT TO THE STATE COURTS HIS FEDERAL CLAIM THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL LABORED UNDER A CONFLICT OF INTEREST.

A.

After Daniel Sydow was listed by the prosecutor as a trial witness against Cammarano, Sydow was interviewed by Cammarano's trial counsel, William Sheaffer, and his investigator, Douglas Pollock. Sydow claimed that Sheaffer and Pollock offered him a bribe in exchange for favorable testimony on behalf of Cammarano. As a result, the prosecutor launched a criminal investigation of Sheaffer and moved to disqualify him from representing Cammarano. (App.A 2434-35). The prosecutor argued that Sheaffer should be disqualified pursuant to the Code of Professional Responsibility because he could be called as a witness to impeach Sydow.

At a hearing on the motion to disqualify, the prosecutor stated that he no longer intended to call Sheaffer as a witness but that Sheaffer should still be removed as Cammarano's counsel. The trial court denied the motion to disqualify on the basis that the prosecution was not going to call Sheaffer as a witness. At no time during the hearing (or any time thereafter) was Cammarano advised by the judge or anyone else that the State Attorney's investigation of his counsel for bribery of a witness and/or suborning perjury raised an issue of ineffective assistance of counsel due to conflict of interest. Nor did Cammarano ever waive his right

to conflict-free counsel. The investigation of Sheaffer continued even after Cammarano's trial during which time the State Attorney's Office considered presenting the matter to a grand jury.

In post-conviction proceedings in the state trial and appellate courts, Cammarano unsuccessfully claimed that Sheaffer failed to provide effective assistance of counsel as ensured by the Sixth Amendment. Cammarano raised the claim again in his federal petition for writ of habeas corpus. The district court ruled that Cammarano failed to present to the state courts any claim that his trial counsel labored under a conflict of interest in violation of the sixth amendment. The district court found that although Cammarano "referenced the conflict of interest claim", he did so as part of his argument that his trial counsel was ineffective for failing to investigate the case or call witnesses at the trial. (R2-60-17). The district court opined that as a prerequisite to federal habeas review, a sixth amendment conflict of interest claim must have first been presented to the state courts "as a separate issue". The only authority cited by the district judge for this proposition was an unpublished decision of the Ninth Circuit, *Bergman v. Duncan*, 86 F.3d 1161 (9th Cir.1996). (R2-60-16-17).

B.

On the issue of exhaustion, the district court's analysis and conclusion were erroneous. A petitioner may fairly present the substance of a federal constitutional claim to the state court without citing "book and verse on the federal constitution." *Picard v. Connor*, 404 U.S. 270, 278, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971). A petitioner has satisfied the exhaustion requirement if the legal basis of the claim made in state court was the "substantial equivalent" of that of the habeas claim. *Id.*, 404 U.S. at 278, 92 S.Ct. at 513. The petitioner need not "[label] his original claims as 'federal' constitutional ones", *Osborne*, 720 F.2d at 1239, or

have cited to the state courts the Constitution or even federal cases. *Snowden v. Singletary*, 135 F.3d 732, 735 n.2 (11th Cir.1998); *Blankenship v. Estelle*, 545 F.2d 510, 514-15 (5th Cir.1977), *cert. denied*, 444 U.S. 856, 100 S.Ct. 115, 62 L.Ed.2d 75 (1979). "[C]ourts should exercise flexibility in determining whether defendants have met this requirement." *Cummings v. Dugger*, 862 F.2d 1504, 1507 (11th Cir.1989).

The right to conflict-free counsel is an essential component of the sixth amendment right to effective assistance of counsel. *Glasser*, *supra*. In fact, this court has stated the following: "Part of effective assistance of counsel is the avoidance of conflicts of interest." *Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir.1992). Accordingly, in *Zamora v. Wainwright*, 610 F.Supp. 159 (S.D.Fla. 1985) the court held that while the petitioner did not specifically refer to "conflict of interest", the Florida courts were given a fair opportunity to rule on the petitioner's claim that his counsel labored under a conflict of interest in that he was more interested in publicity for himself than in petitioner's defense. The district judge should have followed these precedents rather than an unpublished decision of the Ninth Circuit.[8]

In any event, Cammarano did fairly present the conflict of interest claim to the state courts when his post-conviction counsel argued the following:

> Mr. Sheaffer was under investigation himself for possible bribery of a witness. Mr. Sheaffer was told that he should get out of the case by the very prosecutor in this case. He may not have been functioning well at all.
>
> ***
>
> [Sheaffer] was ... under the ... trauma of the investigation. [H]e was very concerned about his entire relationship with witnesses.

(App.G 171; 175).

Cammarano's post-conviction counsel also presented the following argument to the state court:

> [T]he reason[] this case is so singular is that Mr. Sheaffer was himself under investigation during the most critical period of the case, immediately before ... trial and ... Mr. Sheaffer was required under his own assumption of what had to be done to hire a lawyer, Jeff Weiner from Miami to say that [he] was not embroiled in his own defense, to say on the witness stand, "I wasn't really concerned about it," I think is really something that we cannot accept and I would ask Your Honor, as the trier of fact of this hearing, to take into consideration whether it was considered de minimis, so to speak, by this lawyer.

(App.G 307-08).

In addition, in arguing why Sheaffer failed to investigate and recognize the significance of the letter from Waters to Chaplain Matsche, Cammarano's post-conviction counsel further presented the conflict of interest claim to the state court as follows:

> [Sheaffer] conceded that he ... had been under investigation and fortunately for him it did not result in an indictment. The very time he [Sheaffer] was representing my client who was then his client, he was certainly, very, very distracted, Your Honor.
>
> ***

> Mr. Sheaffer, I submit to you, Your Honor, unfortunately fell down on the job here, but not because of some strategic judgment which would be perfectly okay under the cases, [but] because of the fact he did not and could not represent the defendant the way he should have been.

(App.G 406; 411).

Cammarano appealed to the Fifth District Court of Appeal. Cammarano argued in his brief that the prosecutor's criminal investigation of Sheaffer "undoubtedly affected [Sheaffer's] ability to function effectively during the course of preparing [Cammarano's] case." (App.H 20). Cammarano further argued in his brief as follows:

> It is clear from the record that just prior to the information pertaining to Hinton Waters coming to Sheaffer's attention, Sheaffer was forced to defend himself against allegations of criminal impropriety made by Assistant State Attorney, Ray Sharpe. Sharpe initiated a proceeding aimed at having Sheaffer removed as [Cammarano's] counsel. The allegation was that Sheaffer and his investigator had offered money to a witness in return for favorable testimony. Sheaffer defended himself with help from the National Association of Criminal Defense Lawyers. This action against Sheaffer created an atmosphere in which any person would have had difficulty performing. At a minimum, it certainly had a chilling effect on Sheaffer's initiative to interview another potential witness, namely, Hinton Waters.

(App.H 20-21). The appellate court affirmed without opinion. *Cammarano v. State*, 548 So. 2d 671 (Fla.5th DCA 1989). (App. K). The Supreme Court of Florida dismissed review. *Cammarano v. State*, 551 So. 2d 460 (Fla.1989).

The rule in this circuit is that "preciseness of words is not necessary in presenting the issue so long as the state court has an adequate opportunity to consider a party's objection." *Osborne v. Wainwright*, 720 F.2d 1237, 1239 (11th Cir.1983). This Court has also held that "[w]hen a federal habeas petitioner presents what amounts to 'a mere variation in the same claim rather than a different legal theory....' *Wilks v. Israel*, 627 F.2d 32, 38 (7th Cir.1980), *cert. denied*, 449 U.S. 1086, 101 S.Ct. 874, 66 L.Ed.2d 811 (1981), he has presented the state courts with the substance of his claims and thus has properly exhausted them." *Watson v. Dugger*, 945 F.2d 367, 372 (11th Cir.1991). In *Morgan v. Zant*, 743 F.2d 775 (11th Cir.1984), the petitioner for the first time in his brief to this court argued that his counsel failed to inform him that duress is not a defense to murder in Georgia and that this failure caused him to refuse a plea bargain offered by the state. This court noted that the claim was "arguably cognizable as a variation on the ineffectiveness theme urged by the petitioner throughout the course of the litigation." *Id.* at 780. Similarly here, the above-quoted presentations of the conflict claims and the clear theme of the litigation sufficiently apprised the state court of the conflict of interest issue.

C.

The Sixth Amendment right to effective assistance of counsel includes the right to counsel who is not "burdened by an actual conflict of interest." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984). Ordinarily, to establish ineffectiveness of counsel, a petitioner must prove (1) that his attorney's representation fell below an objective standard of reasonableness and (2)

that he was prejudiced. *Id.* at 687, 104 S.Ct. 2064. Prejudice is established where the petitioner demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

A different standard is applied when the attorney's representation of multiple clients has created an actual conflict of interest. In such a case, prejudice is presumed and the petitioner need only show that the actual conflict adversely affected the performance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). As the Supreme Court recognized: "[I]t is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. The reason for the lesser standard is that when counsel represents two clients with opposing interests, both clients cannot be served adequately. *Cuyler, supra*. The presumption of prejudice also applies when an accused is represented by counsel who, at the same time, is being investigated by the prosecution. *United States v. McLain*, 823 F.2d 1457 (11th Cir.1987). The rationale for the application of the presumption is the same, i.e., counsel is simultaneously laboring under competing and inconsistent interests because he must serve as the prosecutor's adversary for the benefit of the client while at the same time curry favor with the prosecutor in the hope of obtaining a favorable resolution of the pending investigation against him. See also *United States v. Grieg*, 967 F.2d 1018 (5th Cir.1992); *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir.1988); *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir.1984); *United States v. Cancilla*, 725 F.2d 867 (2d Cir.1984); *United States v. White*, 706 F.2d 506 (5th Cir.1983); *United States v. Fulton*, 5 F.3d 605 (2d Cir.1993). When a trial court is sufficiently apprised of even the possibility of a conflict of interest, the court has an

obligation to conduct an inquiry of the accused. *Wood v. Georgia*, 450 U.S. 261, 272-73, 101 S.Ct. 1097, 1103-04, 67 L.Ed.2d 220 (1981); *Cuyler*, 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S.Ct. 1173, 1178-79, 55 L.Ed.2d 426 (1978). When a possible conflict has been entirely ignored, reversal is automatic. *Cuyler*, 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holoway*, 435 U.S. at 488, 98 S.Ct. at 1180-81; *Hamilton v. Ford*, 969 F.2d 1006, 1011-12 (11th Cir.1992), *cert. denied*, 507 U.S. 1000, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993).

D.

As noted, in order to obtain relief, Cammarano need not show prejudice but need only show that Sheaffer's performance was adversely affected by the criminal investigation into the allegations against him. Such adverse affect has been found where, during his client's case, counsel "must have been plagued by the fear of sanctions" or the "uncertainty of whether he would be indicted for obstruction of justice." *Grieg*, 967 F.2d at 1024. Adverse affect is also demonstrated by lapses in representation, such as counsel's failure to question the defendant on direct about the allegations, *Mannhalt v. Reed*, 847 F.2d at 581, or "the failure of defense counsel to cross-examine a prosecution witness whose testimony is material or the failure to resist the presentation of arguably inadmissible evidence..." *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir.1991). "Likewise, a failure to act on behalf of a client before trial has representational significance." *Id.*

Here, the record reflects both Sheaffer's serious concern about the consequences of the allegations as well as lapses in Sheaffer's representation of Cammarano. With regard to the former, Sheaffer sought and obtained counsel to represent him in the face of Sydow's accusations and the investigation by the prosecutor. In a motion filed through his counsel, Sheaffer characterized Sydow's allegations as

"serious" and noted that Sheaffer was "advised that the circumstances regarding his representation of Mr. Cammarano will be presented to a local grand jury." (App.A 2509). Sheaffer's motion further stated that the prosecutor's investigation was "publicly intimidating and discrediting." *Id.* Indeed, in a post-conviction hearing, Sheaffer testified: "I was concerned about the effect of the investigation on two fronts, one my immediate representation of Joe Cammarano, and two, my future career as a criminal defense attorney in Orange County." "You might as well take my license if you take my reputation." (*Id.* at 256). These facts alone demonstrate adverse affect under *Grieg, supra.*

"Adverse affect" is also established where: (1) counsel failed to pursue a viable defense strategy or tactic that conflict-free counsel might have undertaken; (2) the strategy or tactic was reasonable under the facts; (3) there is some link between the actual conflict of interest and the alternative strategy. *Freund*, 165 F.3d at 860. One of the chief evils resulting from an attorney's conflict of interest is what counsel refrains from doing to defend his client. *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978).

Sheaffer's lapses in representation meet the above tests for adverse affect. The record reveals the following lapses: Sheaffer failed to interview a key defense witness, Hinton Waters, who would have directly impeached Potenzo; Sheaffer had Cammarano give a statement to the prosecution which was used against Cammarano at his trial[9]; in his direct examination of Cammarano, Sheaffer never asked him to explain to the jury what happened at the bar; and Sheaffer failed to object to the prosecutor's egregiously improper closing argument.[10]

The proper standard for analysis of the conflict of interest issue is not whether defense counsel's actions or inactions constituted reasonable trial strategy. Rather, the correct standard is whether some plausible strategy or tactic might have been pursued, but was not, due to the conflict of

interest. Perillo, 79 F.3d at 450. "We must remember that under *Cuyler* the issue is not what was the best strategy, but whether there was a plausible defense strategy that might have been pursued but was not, because of the conflict of interest. It is difficult to believe that impeaching the star state witness would not be a plausible defense strategy." *Id.* at 451. Similarly here, it is difficult to believe that: Sheaffer's failure to interview Waters and thereafter present his testimony (along with that of the other available witnesses on the issue of Potenzo's recantations) would be a plausible defense strategy; after calling Cammarano to the witness stand, Sheaffer's failure to ask Cammarano what happened at the bar would be a plausible defense strategy; or Sheaffer's failure to object and move for a mistrial when the prosecutor asked the jury to find Cammarano guilty because Sheaffer was privately retained by Cammarano whereas Potenzo could not afford private counsel would be a plausible defense strategy. By antagonizing and/or defeating the prosecutor in the representation of Cammarano, Sheaffer could not be helping his own cause. Sheaffer's actions and inactions were attributable to his divided loyalty between himself and Cammarano. Thus, Cammarano sufficiently demonstrated that Sheaffer's performance was adversely affected by the prosecutor's investigation. Additionally, Cammarano's Sixth Amendment rights were also violated because the state trial judge failed to conduct an inquiry when he was placed on notice of the possibility of conflict. That failure warrants automatic reversal. See *Wood, supra; Cuyler, supra*; *Hamilton, supra.*

E. Evidentiary Hearing

At the very least, the cause should be remanded for an evidentiary hearing on the issue. *Cave v. Singletary*, 971 F.2d at 1516; *Burden v. Zant*, 871 F.2d 956 (11th Cir.1989) See also *Huynh v. King*, 95 F.3d 1052 (11th Cir.1996).

II.

THE DISTRICT COURT ERRED IN RULING THAT CAMMARANO WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE COUNSEL FAILED TO INTERVIEW AND PRESENT WITNESSES WHO WOULD HAVE TESTIFIED THAT THE PROSECUTION'S STAR WITNESS CONFESSED TO THEM THAT HE WAS FALSELY IMPLICATING CAMMARANO.

A.

Prior to Cammarano's trial, Chaplain Dan Matsche of the Orange County Jail met with Sheaffer and showed him a letter from Hinton Waters who related that he was told by Potenzo that Cammarano knew nothing of Potenzo's plan to rob the bar and that Potenzo said he would do whatever was necessary to save himself from the electric chair. Sheaffer took the letter but appeared to the Chaplain to be disinterested. Waters was never contacted by Sheaffer concerning the contents of the letter and Sheaffer did not call Waters as a witness at trial. (App.G 450).

At a hearing on Cammarano's motion for post-conviction relief in which Cammarano claimed that Sheaffer was ineffective for failing to have interviewed and presented Waters as a defense witness, Sheaffer attempted to justify his conduct by claiming he acted upon information received by two other attorneys whom he declined to name. After being ordered to name the attorneys, Sheaffer gave two names. However, those attorneys testified at a rehearing and directly impeached Sheaffer. (See Statement of Facts at 18-19).

The state judge denied Cammarano's motion for post-conviction relief and the issue was presented to the district court in the federal habeas corpus petition. The district court ruled that Cammarano had not "presented any evidence that

Waters' testimony would have been more persuasive than Caripy's testimony" and therefore failed to show prejudice. (R2-60-19).

B.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary". *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2052. Where defense counsel fails to conduct a reasonable investigation, the failure to present the evidence not investigated is "not a result of a tactical choice." *Blanco v. Singletary*, 943 F.2d 1477, 1500 (11th Cir.1991). Accord, *United States v. Gray*, 878 F.2d 702, 711 (3d Cir.1989); *Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir.1986); *Birt v. Montgomery*, 709 F.2d 690, 701 (7th Cir.1983), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984). See also *Hart v. Gomez*, 174 F.3d 1067 (9th Cir.1999); *Evans v. Lewis*, 855 F.2d 631 (9th Cir.1988). Not all "strategic" or "tactical" decisions by counsel are immune from scrutiny for ineffectiveness under the sixth amendment. A tactical decision can be "objectively unreasonable". See, e.g., *Huynh v. King*, 95 F.3d 1052 (11th Cir.1996) (defense counsel's tactical decision to delay filing of potentially meritorious suppression motion in order to later obtain more favorable federal habeas review was objectively unreasonable).

C.

The district court erred in ruling that Cammarano had not "presented any evidence that Waters' testimony would have been more persuasive than Caripy's testimony" and therefore failed to show prejudice. Of course, Cammarano could not have presented evidence to the district judge without an evidentiary hearing which Cammarano was denied. If the district judge was referring to the state court

proceedings, that record conclusively refutes the district court's conclusion by demonstrating palpable prejudice. Caripy's testimony was conclusory and not believable. He merely testified at the trial that he shared a holding cell with Potenzo shortly after Potenzo's arrest, that Potenzo told him that he committed the shooting, and that Cammarano had nothing to do "with the whole thing." (App.A 1155). Indeed, in his closing argument to the jury, the prosecutor easily dismissed Caripy's testimony as not credible. The state record also utterly belies Sheaffer's testimony that Caripy's testimony more closely detailed Cammarano's account. By comparison, Waters' account was both detailed and credible. And Sheaffer was additionally ineffective for not investigating or presenting the several other witnesses whom he acknowledged were available to corroborate Waters. Thus, Cammarano presented more than sufficient facts to prove that Sheaffer's failure to interview and present Waters and the other witnesses constituted objectively unreasonable omissions which prejudiced Cammarano upon the key issue in the case, namely, the credibility of Potenzo.

D. Evidentiary Hearing

Alternatively, an evidentiary hearing should be ordered because the allegations of ineffectiveness, if true, warrant relief. *Cave v. Singletary, supra*. Additionally, the district court found no prejudice on the ground that Cammarano had "not presented any evidence that Waters' testimony would have been more persuasive than Caripy's..." (R2-60-19). That conclusion should not have been reached without first affording Cammarano the opportunity to present such evidence.

III.

THE DISTRICT JUDGE ERRED IN RULING THAT THE STATE COURT'S FAILURE TO SUPPRESS CAMMARANO'S STATEMENTS, EVEN IF VIOLATIVE OF *MIRANDA* AND ITS PROGENY, CONSTITUTED HARMLESS ERROR.

A. Facts

See pages 3-6 of this brief.

B. Law

If a suspect knowingly and voluntarily waives his *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests counsel. *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Once the right to counsel has been invoked, "the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474, 86 S.Ct. at 1627. In *Edwards v. Arizona*, the Supreme Court interpreted the Fifth and Fourteenth Amendments as requiring that all questioning must cease during a custodial interrogation when an accused asserts his right to counsel." *Parker v. Singletary*, 974 F.2d 1562, 1572 (11th Cir.1992). See also *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). The *Edwards* ruling established a "rigid prophylactic rule." *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 492, 83 L.Ed.2d 488 (1984) (per curiam) (citing *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979)).

A suspect invokes the right to counsel when he makes "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil*

v. Wisconsin, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991). "When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. *Edwards*, 451 U.S. at 484-87, 101 S.Ct. at 1884-86. If the request for counsel is equivocal, the police should, but are not required to, clarify the meaning of the request. *Coleman v. Singletary*, 30 F.3d 1420 (11th Cir.1994). See also *Kyger v. Carlton*, 146 F.3d 374 (6th Cir.1998).

C. Application of Law to Facts

In response to the advisement of *Miranda* rights, Cammarano specifically invoked the name of his counsel and asked if that attorney could be present. The police officers were required to cease interrogation under *Miranda* and *Edwards* because Cammarano made a "statement that can reasonably be construed to be expression of a desire for the assistance of any attorney in dealing with custodial interrogation by the police", *McNeil v. Wisconsin*, 501 U.S. at 178, 111 S.Ct. at 2209. Cammarano's request was not equivocal as far as the officers were concerned. Indeed, Investigator Mundy testified that Gauntlett told him that Cammarano "wished an attorney." (App.A 1684). Thus, the officers themselves understood Cammarano's inquiry as an expression of his desire for his counsel's presence. Under such circumstances, Cammarano's Fifth Amendment rights under *Edwards* and *Miranda* were violated.[11]

D. Harmless Error

The district judge ruled that even if Cammarano's statements were erroneously admitted in violation of *Edwards*, the error was harmless. The district judge reasoned that Cammarano's guilt was established by the testimony of

Potenzo, witnesses who placed Cammarano at the scene, Cammarano carrying a bag of money from the bar, and Cammarano's first statement to the police at the scene which was not challenged. The district judge further reasoned that all of Cammarano's statements were admissible to impeach his testimony despite any *Edwards* violations. (R2-60-23).

Where the prosecution claims in a habeas proceeding that an *Edwards* violation was harmless, it bears the burden of proving that the admission of the statement did not have a "'substantial or injurious effect or influence in determining the jury's verdict.'". *Craig v. Singletary*, 127 F.3d 1030, 1040 (11th Cir.1997) (quoting *Brecht v. Abahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1721-22, 123 L.Ed.2d 353 (1993)). "Because confessions carry 'extreme probative weight," the admission of an unlawfully obtained confession rarely is 'harmless error.' In fact, we have ruled the admission of an unlawful confession harmless only in limited instances, such as where there was in evidence at least one other lawful confession by the defendant." *Id.* (quoting *United States v. Hernandez*, 574 F.2d 1362, 1372 (5th Cir.1978)). In cases where the admission of an unlawful confession was harmless, the prosecution produced "direct, uncontradicted, physical evidence of guilt -- such as that the defendant was found holding the drugs he was charged with possessing." Christopher, 824 F.2d 846 n.24.

The harmless error doctrine was erroneously applied for two reasons. First, the State of Florida failed to provide a record sufficient to apply the doctrine. In its response to Cammarano's petition for writ of habeas corpus in the district court, the State contended that it brought forward the entire state record. (R1-41). That was not the case. The State failed to provide the district court with Cammarano's statements. Without the statements themselves, the State could not have shown, and the district court should not have found, that their admission into evidence was harmless.

Second, the references to the statements in the testimony of the interrogating officers not only refute any

claim of harmlessness, but conclusively establish that the admission into evidence of the statements was highly prejudicial. The sole factual dispute at the trial, according to the prosecutor in his closing statement to the jurors, was whether Cammarano knew that Potenzo was going to commit a robbery. The prosecutor told the jurors the following: if Cammarano had such knowledge, the verdict should be guilty of felony murder; but if Cammarano did not know Potenzo was going to commit a robbery, the jurors should vote not guilty.

Cammarano did not dispute his presence at the bar and neither of his two unchallenged statements contained an admission of either participation in any crime or knowledge that Potenzo intended to commit any crime at the bar. The fatal flaw in the district court's analysis is obvious. The initial unchallenged statement, unlike the subsequent challenged statements, contains no admission of guilty knowledge. The other unchallenged statement was made when Cammarano's counsel accompanied him to the office of the prosecutor. That statement was also devoid of any admission of knowledge. Thus, the district court erred in finding harmless error based upon the testimony of any witnesses who placed Cammarano at the scene or the admission of Cammarano's first statement.

As for Potenzo's testimony, his credibility was assailed. He testified against Cammarano to save himself from the electric chair and to get assigned to a low security prison. Additionally, after the trial, Potenzo recanted his testimony that Cammarano had prior knowledge of the robbery.

The only other evidence on the critical issue of guilty knowledge was Cammarano's first statement given after the *Edwards* violation. Investigator Mundy testified that Cammarano confessed that he knew that Potenzo was going to commit a robbery. The jurors could have found Potenzo not credible but nevertheless found Cammarano guilty of felony murder by crediting the statement that should have

been suppressed. Thus, the most credible evidence of guilty knowledge was Cammarano's challenged statement. The erroneous admission of such a statement cannot be considered harmless. See *Owen*, 849 F.2d at 540.

The district judge also reasoned that any statements admitted in violation of *Edwards* were admissible to impeach Cammarano, citing *Harris v. New York*, 401 U.S. 222 (1971). (R2-60-23). That presupposes that Cammarano would have testified if his statements had been suppressed. There is no basis in the record for such speculation. In fact, Cammarano's decision to testify was likely influenced by the denial of his motion to suppress statements so that he could counter or explain them. Had the statements been suppressed, there would have been little or no need for him to have testified because the only evidence of guilty knowledge would have been the testimony of Potenzo who was far from a trustworthy witness.

E. Evidentiary Hearing

At the very least, the district judge should have conducted an evidentiary hearing on the issues surrounding the admissibility of Cammarano's statements because the facts alleged, if proven, would require relief. *Cave v. Singletary*, *supra*. Cammarano's allegations of *Miranda* violations, if proven, would establish a right to relief. An evidentiary hearing is also warranted due to unresolved factual issues. The district judge found that an *Edwards* violation would constitute harmless error but did so without the benefit of any of Cammarano's statements. An evidentiary hearing is required for the production and analysis of Cammarano's statements. Additionally, the district judge found that there was a factual dispute not resolved by the state court and which the district judge declined to resolve in view of its application of the harmless error doctrine. The district judge viewed the testimony of Gauntlett and Cammarano as in conflict over whether

Cammarano's counsel request was unequivocal or equivocal. (R2-60). Assuming, arguendo, that there is a conflict, the need to resolve such a factual dispute provides yet another ground for an evidentiary hearing. Therefore, as an alternative ground for relief, Cammarano requests reversal and remand for an evidentiary hearing.

IV.

THE DISTRICT COURT ERRED IN RULING THAT CAMMARANO'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHERE, AT A POST-CONVICTION PROCEEDING, THE STATE COURT EXCLUDED EVIDENCE THAT THE PROSECUTION'S STAR WITNESS CONFESSED THAT HIS TESTIMONY IMPLICATING CAMMARANO WAS PERJURIOUS.

A. Facts

See pages 19-24 of this brief.

B. Exhaustion of State Remedies

In accordance with cases such as *Hutchins v. Wainwright*, 715 F.2d 512 (11th Cir.1983), *cert. denied*, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984), *Watson v. Dugger*, 945 F.2d 367 (11th Cir.1991), and *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir.1983), Cammarano sufficiently presented this federal issue to the state courts. On appeal, Cammarano specifically cited *Chambers* and *Baker* and presented claims identical to substance to the federal claim. Cammarano exhausted the federal claim just as the petitioner exhausted her federal claim in *Cummings, supra* Therefore, the district court's finding on exhaustion should be reversed.

B. The Merits

In denying the post-conviction motion, the state judge ruled, in pertinent part, that "the evidence sought to be brought before the court ... is evidence that not only could have been discovered prior to trial by the exercise of due diligence, but in fact was discovered and considered, and that evidence is that Mr. Potenzo is not a truthful person." (App.P 131). The judge also found that Potenzo was available and did not have a Fifth Amendment privilege not to testify because he waived the privilege by testifying at Cammarano's trial. (App.P 132).

The state judge's ruling is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) for two reasons. First, the ruling finds no support in the record or the law. The state judge clearly misperceived the issue when he equated Potenzo's recantation with evidence of impeachment. Potenzo's recantation was neither discovered nor considered prior to the post-conviction proceeding. The judge also erred in finding that Potenzo waived his Fifth Amendment privilege by having testified years earlier at Cammarano's trial. That waiver rule applies where the witness has testified in a single proceeding. See *Mitchell v. United States*, ___ U.S. ___, 119 S.Ct. 1307, 1311-12, 143 L.Ed.2d 424 (1999). Additionally, when Potenzo recanted under oath, he confessed to a criminal felony violation under Florida law, namely, perjury by contradictory statements. See § 837.021, Florida Statutes. Thus, his invocation of the privilege was valid.

Second, because the hearing afforded Cammarano was only a "paper hearing and was not conducted by the original trial judge", the findings of the state judge are not entitled to a presumption of correctness on this ground as well. Perillo, 79 F.3d at 445-47.

When a state trial court's evidentiary rulings result in fundamental unfairness, the petitioner is entitled to habeas relief for violation of his right to due process of law. *Boykins*

v. Wainwright, 737 F.2d 1539, 1544 (11th Cir.1984) and cases cited. A denial of fundamental fairness takes place when erroneously excluded " 'is material in the sense of a crucial, critical, highly significant factor.' " *Snowden*, 135 F.3d at 737 (quoting *Osborne*, 720 F.2d at 1238)). See also *Boykins*, 737 F.2d at 1544. Here, Cammarano was denied fundamental fairness when, during Cammarano's post-conviction bid for a new trial, the state trial judge excluded from evidence Potenzo's sworn statements that he committed perjury at Cammarano's trial when he testified that Cammarano had prior knowledge about the robbery. There can be no question but that Potenzo's sworn statements met the above test of materiality because whether Cammarano had knowledge of Potenzo's intent to commit the underlying felony in the felony murder accusation was the "crucial, critical, highly significant factor" at his trial. See also *Gonzales v. Lytle*, 167 F.3d 1318 (10th Cir.1999); *Rivera v. Director, Department of Corrections, State of Illinois*, 915 F.2d 280 (7th Cir.1990).

Potenzo's invocation on paper of his privilege against self-incrimination did not provide a basis for excluding his recantation. To the contrary, under the identical provisions of both the Florida and federal rules of evidence, it is precisely where the declarant is unavailable that his statement against penal interest is admissible. Fed.R.Evid. 804(b)(3); § 90.804(2)(c), Florida Statutes.[12] Nor could Potenzo's invocation of his Fifth Amendment privilege, in and of itself, warrant a finding of unreliability of his recantation. To the contrary, viewing all of the relevant evidence, any unreliability inherent in the invocation (a questionable proposition at best) is easily outweighed by the evidence of reliability, namely, Potenzo's corroborating pretrial admissions to Waters (and others), the availability of Waters and Mazzara, the detailed proffers of their testimony that Potenzo admitted the perjury to them, and the fact that Potenzo admitted under oath that his testimony implicating Cammarano was false.

Alternatively, the issue should be the subject of an evidentiary hearing. The determination of the reliability of Potenzo's recantation(s) is the type of issue recognized to require evidentiary development. See *Davis v. Zant*, 36 F.3d 1358, 1544 (11th Cir.1994) (reliability of excluded confession could warrant evidentiary hearing). And an evidentiary hearing is required because the allegations, if true, would warrant federal habeas corpus relief. *Cave, supra*.

CONCLUSION

Based upon the foregoing, the appellant respectfully requests reversal of the judgment of the district court and remand with directions to enter judgment for the appellant. Alternatively, the appellant respectfully request reversal and remand with directions to conduct an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief containing 14,349 words was mailed to Rebecca Wall, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor,

Daytona Beach, FL 32118, this 13th day of September, 1999.

/s/ Paul Morris
PAUL MORRIS

ENDNOTES

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1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2 There is no transcript of the tape recording in the record.

3 Nor is there a transcript of this tape recording in the record.

4 Sheaffer had Cammarano give a statement to the prosecutor on December 19, 1984. The prosecutor played a tape recording of the statement for the jury during the state's case in chief. (App.A 1027-29, State's Exhibit 56). There is no transcript of the statement in the record.

5 At the trial, Caripy had testified that he shared a holding cell with Potenzo shortly after Potenzo's arrest. (App.A 1152-54). Caripy testified that Potenzo told him that he had committed the shooting and that Cammarano had nothing to do "with the whole thing." (App.A 1155).

6 The prosecutor's closing argument was as follows: "Is there any justice in people with a lot of money getting off; people with court appointed lawyers getting convicted? I don't think so." (App.A 1470).

7 At the trial, Sheaffer presented Doctor George Lindenfeld, a clinical psychologist. Lindenfeld testified that he hypnotized Cammarano on four occasions and asked him to recall the events at the bar. Lindenfeld concluded that the four statements were consistent with each other. The trial judge ruled that the statements were inadmissible hearsay. (App.A 1354-72; 1395-96).

[8] In addition to lacking precedential value, the Ninth Circuit decision is distinguishable on the ground that its affirmance of the dismissal of the petitioner's habeas corpus action was without prejudice.

[9] As noted, prior to the trial, Sheaffer accompanied Cammarano to the Office of the State Attorney where Cammarano gave a statement and subjected himself to interrogation by the prosecutor and police officers. Sheaffer placed no conditions upon the meeting. In other words, there was no understanding that the statement was being offered during plea negotiations, which would have rendered it inadmissible under well-settled law Florida law, see *Richardson v. State*, 706 So. 2d 1349 (Fla.1998); Florida Rule of Criminal Procedure 3.172(h) (formerly 3.172(d)), or that the statement would otherwise not be used against Cammarano.

[10] See n.6 for the prosecutor's argument. Such prosecutorial comment upon a defendant's decision to retain counsel is improper. See *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir.1995); *United States v. Daoud*, 741 F.2d 478 480-81 (1st Cir.1984); *Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir.1983);*United States v. McDonald*, 620 F.2d 559, 562-63 (5th Cir.1980). This level of prosecutorial misconduct, in and of itself, can render a petitioner's trial fundamentally unfair. See *Davis v. Zant*, 36 F.3d 1538 (11th Cir.1994).

[11] The fact that Cammarano thereafter did answer questions is of no moment. See *Smith*, 469 U.S. at 100, 105 S.Ct. at 495. Accord, *Owen v. Alabama*, 849 F.2d 536 (11th Cir.1988).

[12] Moreover, had the state's intention been to expose all of the facts rather than hide behind Potenzo's invocation, the state could have subpoenaed Potenzo to testify and by operation of Florida statutory law, he would have been immunized and could not have claimed a privilege not to testify. See §914.04, Florida Statutes.